The Institutional Relations and Relationships of the United Kingdom Final Court of Appeal; An empirical analysis of the UK's top courts 2007-2011

PATERSON, JACLYN,LAURA

DURHAM UNIVERSITY

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Abstract

This thesis conducts a systematic, empirical examination of each of the judgments that arose in the UK final court of appeal in the sessions 2007-2011, covering the transitional period between the Appellate Committee of the House of Lords and the Supreme Court of the United Kingdom. The aim of the thesis was to establish whether the institutional independence of the court, following the enactment of the Constitutional Reform Act 2005, resulted in a more powerful court within the UK constitution. The relative power of the court was gauged by empirically reviewing each of the court's legal and political institutional relationships, together with the administrative efficiency of the court, across the transitional period. The study concludes with an assessment of whether the Supreme Court appeared to be a more powerful and assertive institution than its predecessor. The conclusion also draws upon the significant effects that the influence of the European Convention of Human Rights and the jurisprudence of the European Court of Human Rights appeared to have on the court's institutional relationships and administrative efficiency in the time period.

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Jaclyn Laura Paterson

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UNITED KINGDOM COURTS

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European Court of Human Rights

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Abbreviations

BBC	British Broadcasting Corporation
CA Civ	Court of Appeal Civil Division
CA Crim	Court of Appeal Criminal Division
CJEU	European Court of Justice
CLJ	Cambridge Law Journal
CPS	Crown Prosecution Service
CRA	Constitutional Reform Act 2005
CUP	Cambridge University Press
DPP	Director of Public Prosecutions
ECA	European Communities Act 1972
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
Edin LR	Edinburgh Law Review
EHRLR	European Human Rights Law Review
EU	European Union
EU Law	European Union Law
FSA	Final Services Authority
HM	Her Majesty's
HMRC	Her Majesty's Revenue and Customs
HSMP	Highly Skilled Migrant Programme
HRA	Human Rights Act 1998
IMGs	International Medical Graduates
IPT	Investigatory Powers Tribunal
JCPC	Judicial Committee of the Privy Council

JFS	Jewish Free School
LS	Legal Studies
LTTE	Liberation Tigers of Tamil Eelam
LQR	Law Quarterly Review
MLR	Modern Law Review
OJLS	Oxford Journal Legal Studies
OUP	Oxford University Press
PACE	Police and Criminal Evidence Act 1984
PL	Public Law
PD	Practice Direction
PTA	Prevention of Terrorism Act 2005
RIPA	Regulation of Investigatory Powers Act 2000
SCRs	Security Council Resolutions
SIAC	Special Immigration Appeals Commission
TFEU	Treaty of the Functioning of the European Union
UK	United Kingdom
UKHL	Appellate Committee of the House of Lords
UKSC	Supreme Court of the United Kingdom
USA	United States of America

Statement of Copyright

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For Ross and Hugh

Chapter 1; Introduction

The 1st October 2009 was one of the most significant dates in the UK's modern constitutional history. It brought apparent legal, theoretical as well as visual changes to the constitution and seemingly went against the UK's constitutional heritage of evolutionary rather than revolutionary change. The commanding words of s23 of the Constitutional Reform Act 2005 ('CRA'), which had forewarned that 'there is to be a Supreme Court of the United Kingdom', were brought into force.[1] The Lords of Appeal in Ordinary who had sat in the Appellate Committee of the House of Lords ('Appellate Committee') immediately before the commencement of Part 3 of the CRA 2005 became the new Justices of the Supreme Court of the United Kingdom ('Supreme Court')[2] and the jurisdiction of the Appellate Committee, alongside the devolution issue jurisdiction of the Judicial Committee of the Privy Council ('JCPC'), was transferred to the new court.[3]

Visually, the Supreme Court instantly benefitted from being housed in a distinct building separate from Parliament. The neo-gothic architectural building of the former Middlesex Guildhall on Parliament Square was to be the home of the new Supreme Court. The choice of Parliament Square as the setting for the new court was fitting, being at the heart of the UK's modern day political, legal and constitutional machinery. The prestigious location of the court conveyed to the outside world the central role that the court was to play within the UK's legal and political constitution.[4]

The new court was a blank canvas from which to carve a new reputation and that reputation had to be established across each of the court's institutional relationships. This thesis explores the nature of the final appeal court's political and legal institutional relationships in the years 2007-2011, covering the transition from the Appellate Committee to the Supreme Court, by empirically measuring changes that occurred in those relationships during that time period. The empirical study asks a series of questions, each designed to comment on a specific aspect of an institutional relationship, across 246 judgments that arose in the time period.

The thesis begins with a thematic review of institutional relations and relationships. The section that follows explores the relative dynamism of the constitution and the extent to which it sets the framework for institutional relationships and state institutional power. This leads to the theoretical

[1] CRA 2005 (Commencement No. 11) Order 2009
[2] s24 CRA 2005
[3] s40 and sch 9 CRA 2005
[4] JAG Griffiths,'The Political Constitution' (1979) 42(1) MLR 1, 17. See also D Nicol, 'Law and Politics after the Human Rights Act' [2006] PL 722

background to the project, which focuses on the constitutional principles underpinning the UK constitution that have the capacity to accommodate fluctuating judicial power, to realign institutional relationships and provide the judiciary with a more prominent constitutional role. Finally, the introductory chapter provides a review of the political and legal reasons for creating the Supreme Court and the extent to which a change in role for the court was envisaged as part of the constitutional changes enacted by the CRA.

The introduction will then move on to look at the influence that constitutional theory had on the design of empirical database and structure of the thesis. Empirical studies of Appellate Committee are relatively scarce in the UK, however they provide the foundations for the current study and demonstrate the complexity but immense utility of empirical work. The empirical studies, the relevant constitutional theoretical literature and extra-judicial opinion are best appreciated when set in the context of the current study and will therefore be referred to throughout the thesis.

Thematic Review; Institutional Relations and Relationships

The central theme linking the chapters of this thesis is the institutional relationships of the Supreme Court. The legal, social and political positioning of the Supreme Court is not fixed and is instead relative to the character of the institutional relationship examined. This is termed 'relative power' in the thesis. Relative power appreciates that the power dynamics between the final appeal court and each of the institutions reviewed together with the influence which one institution has over the other will differ, depending on where that institution is placed either legally or politically within the constitution. The power of an institution may change at different points in time or as a result of an external event.[5] For each relationship there is a notional axis of power and the relative power of the Supreme Court will depend upon which of these relations or underlying relationships is viewed. The data generated from the variables, for both the Appellate Committee and Supreme Court, will form the basis of this assessment. The data will record where the power balance appears to lie in any given relationship over the study period and whether there was any perceptible change in these relations from the two years preceding the 1st October 2009 to the two years thereafter.

In measuring change, it should be remembered that the two final appeal courts under review are not discrete institutions. The Supreme Court is the successor of the Appellate Committee and the JCPC and as such, carries forth many of the characteristics of the Appellate Committee. The CRA appeared

to create a new court, borne from statute and specific constitutional design, however the Supreme Court has a legal pedigree dating back over one hundred years to the enactment of the Appellate Jurisdiction Act 1876. Blom-Cooper and Drewry felt that the institutional relationships 'between the House of Lords and other legal, political and administrative institutions' were part of the 'flesh' of the Appellate Committee.[6] The Supreme Court had to develop its institutional relations from the point that they were left by the Appellate Committee. Indeed, the linkage between the Appellate Committee and the Supreme Court is emphasised by the fact that many of the Law Lords became the first Justices of the Supreme Court, informing its founding practices and steering its initial course. Any attempt to empirically measure the changes in these relationships had to acknowledge and be sensitive to the heritage and personnel of the Supreme Court and the part they played in shaping institutional relationships going forward.

Constitutional Dynamism and Institutional Relationships

State institutions each have a role to play in creating, enforcing or revising the legal order. The constitution, within a democracy, must recognise the non-static nature of state power and account for how that power is balanced between the institutions and how it is legitimately demarcated and controlled.[7] An accurate assessment of institutional power permits those institutions to be held to account for their actions and their authority legitimately maintained.[8] The constitution and the theory underpinning it are therefore continually developing.

The most enduring constitutional power in the UK remains that of a sovereign Parliament. According to Dicey's orthodox theory, Parliament has the power to make or unmake any law whatsoever and thus has the legal, constitutional and theoretical power to override any law, convention or constitutional principle, including the parallel imperative of the rule of law.[9] However, in recent times this Diceyan concept of sovereign power has been challenged by increasing judicial power.[10] This power has been arrogated to the judges either through the common law[11] or through

[5]This was acknowledged by the House of Lords Select Committee on the Constitution. It felt that the 'character' of relations between the judiciary, the executive and the legislature had '… changed significantly' as a result of 'changes in governance' and 'wider societal change.' House of Lords Select Committee on the Constitution, *Relations between the Executive, the Judiciary and Parliament* (HL 151), July 2007, para 1

[6]L Blom-Cooper and G Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon Press, 1972), p100

[7]Laws, 'Law and Democracy' [1995] PL 72, 81

[8]See A Le Sueur, 'Developing Mechanisms for judicial accountability in the UK' (2004) 24(1/2) LS 73 for a review of the conceptual difficulties in holding the judiciary to account

[9] AV Dicey, *The Law of the Constitution* (Macmillan & Co, 1885)

[10]See obiter speeches made in *Jackson v HM Attorney General* [2005] UKHL 56 [102] (per Lord Steyn), [107] (per Lord Hope) and [159] (per Lady Hale)

a rise in judicial review of state action.[12] The rise in judicial power is also partly owing to the contemporary understanding of the fundamental nature of the common law's inherent rights and values,[13] and the 'resurgence'[14] of these rights following the incorporation of the Convention via the Human Rights Act 1998 ('HRA').[15] The post-1997 statutory constitutional reforms, not only accelerated the pace of constitutional change in the UK,[16] they reinvigorated common law values by providing a level of legislative and thus democratic sanction to rights based ideals.

The creation of the Supreme Court altered the constitutional paradigm between the three branches of state once more,[17] with the CRA providing the necessary infrastructure for a more independent state institution. Commentators[18] and judges[19] alike questioned whether the investment of considerable legal, political and economic capital in the creation of the court merited something bolder than merely recycling the jurisdiction and personnel of the Appellate Committee. Speculation centred on whether the Justices would take a more dominant constitutional role.[20] Lord Hope felt that the Supreme Court name combined with the structural separation from Parliament provided the court with 'an added authority' and although there did not appear to be any change in the 'relationship' with the other branches of state, he appreciated that,

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[11]See for instance the gradual judicial erosion of the doctrine of implied repeal in *R v Secretary of State for Transport, ex p Factortame Ltd (No2)* [1991] 1 AC 603, *Thoburn v Sunderland Council* [2002] EWHC 195 (Admin) [62-63] (per Laws LJ) and more recently the obiter remarks of Lord Mance and Neuberger in *R (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 [207]

[12]See Lord Carnworth's written evidence to the House of Lords Select Committee on Constitutional Reform Bill, Session 2003-2004 where he noted the 'rapid development' of judicial review of government decisions in the last three decades as well as the increase in HRA decisions that attract 'more direct controversy, political or moral'. <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125we10.htm>accessed 25 February 2016

[13]*R. v Secretary of State for the Home Department ex p. Simms* [2000] 2 AC 115, 131 (per Lord Hoffmann)

[14]See S Stephenson, 'The Supreme Court's renewed interest in autochthonous constitutionalism' [2015] PL 394, 395, as evidenced in four recent Supreme Court decisions; *R (on the application of HS2 Action Alliance) Ltd v Secretary of State for Transport* [2014] UKSC 3; *R (on the application of Osborn) v Parole Board* [2013] UKSC 61; *Kennedy v Information Commissioner* [2014] UKSC 20 and *A v BBC* [2014] UKSC 25

[15]See Lord Justice-General Rodger's comments in *HM Advocate v Montgomery* [2000] JC 111 ,117, cited with approval by Lord Reed in *Osborn*, n14 [63]

[16]See V Bogdanor, *The New British Constitution* (Hart Publishing, 2009) and A King, *The British Constitution* (OUP, 2007), p2-3 and p351

[17]House of Lords Select Committee on the Constitution (HL 151),n5, para 16. K Malleson's evidence nevertheless suggests that the nature of that change may be less about going on the offensive and instead about allowing the judiciary to '… have a more structured and active role in defending themselves from criticism and ensuring the proper resources and support for the courts are in place.' See para 18

[18]Masterman described the proposals as 'conservative' in terms of jurisdiction; R Masterman, 'A Supreme Court for the United Kingdom: two steps forward, but one step back on judicial independence' [2004] PL 48

[19]Baroness Hale, 'A Supreme Court for the United Kingdom?' (2004) 24(1/2) LS 36, 41-42. Lord Hope, 'The creation of a Supreme Court was it worth it?'(Barnard Inn's Reading, 24 June 2010) <www.guardian.co.uk/law/2010/jun/24/uk-supreme-court> accessed 22 August 2010

[20]J Webber, 'Supreme Courts, independence and democratic agency' (2004) 24(1/2) LS 55

> under our system the law- public law in particular- is never settled. The boundaries between what can and cannot be done are constantly being tested on all sides.[21]

A BBC Radio 4 programme revealed that key judicial figures, some of whom would play a role in the new court, were unsure of the full ramifications of the change.[22] Lord Phillips and Lord Bingham were the most measured in their comments. Lord Phillips did not envisage a fundamental change in judicial power or assertiveness however he conceded that he could not 'predict quite how we are going to function in the new world.' Lord Bingham also dismissed any ideas of the Justices having a 'rush of blood to the head' or 'throwing their weight around'. Lord Neuberger led the way for a more reformist perspective on the power of the court. He felt there was a risk of 'judges arrogating to themselves greater power than they have at the moment.' He suggested that the newly found institutional independence of the court 'could' be the catalyst to engender a more assertive court with the executive arm being the most likely to feel the full force of this. Lord Falconer, the then Lord Chancellor, agreed, predicting that both judicial review and individual rights would be the likely conduits for an emboldened court. Lord Collins also felt that the Supreme Court 'might evolve into a different type of body, perhaps not as pivotal as the US Supreme Court but playing a much more central role in the legal system … '.

Alan Paterson looked at 'role' as part of his 1970s study examining the processes behind decision-making in the Appellate Committee. He found that the concept of 'role' was not one dimensional. Instead, the final appeal court's decision-making was to be regarded as a social process influenced by the court's perceived role in relation to various reference groups.[23]

> A person's role is what is expected of him in the particular social position in which he occupies' or 'the cluster of normative expectations which exist at any given time as to the behaviour and attributes required of a person who holds a particular status or position.[24]

Paterson made clear that 'expectation' is two dimensional in that it derives from both the role-holder and the 'reference groups' to which that role-holder has regard when making a decision.[25] For 'expectations' to have any meaningful impact on the 'role' of the court they presumably have to be 'legitimate expectations', to borrow a phrase from administrative law and must not venture too far beyond what is within the court's capacity to achieve. Provided these expectations are legitimate and the court is able to substantially fulfil them, the court's 'social' role should flourish.

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[21]Lord Hope, 'The creation of a Supreme Court', n19
[22]J Rosenburg, 'Top Dogs', BBC Radio 4 programme broadcast on 8 September 2009
[23]A Paterson, *The Law Lords* (Macmillan Press, 1982) p7
[24]Paterson, *The Law Lords*, n23, p3

Paterson accepted the possibility that the social role of the court could change.

> Role…has a dynamic aspect in that a role and performance are, to a greater or lesser degree, open to 'negotiation' between the incumbent and his audience.[26]

The final appeal court's changing role must be measured in each of the three main institutional groups that have a relationship with the court; UK State Institutions (Chapter 4), UK Lower Courts (Chapter 5) and European Courts (Chapter 6). The Supreme Court also has a non-institutional relationship with the wider public. The latter is more difficult to measure and will not be specifically examined in this thesis.[27] Nevertheless, the Supreme Court is more aware of the need to inform the public of its role, than the Appellate Committee was, and is actively using public lectures and televised broadcasts to educate the wider public on nature of the court.[28] A strong reputation will only be earned on the back of a successful execution of the court's expected role in each institutional relationship. Reputation is therefore linked to role and the remit of that role will depend on the dynamics of the particular institutional relationship.

This thesis takes an objective view to measuring change in institutional relationships in the time period, however in structuring the thesis and presenting the results the study was guided by what could be perceived as 'good' institutional relations. A strong institutional relationship includes such positive characteristics as institutional efficiency, clear institutional communication, stability in the law, institutional respect and where necessary deference, alongside a degree of flexibility to accommodate both institutional and constitutional change. Thus institutional relationships are complex and have to strike an appropriate balance between several competing objectives. Each institutional relationship will vary in its ability to accommodate a paradigm shift in the role of the court, depending on the constitution's ability to accept and legitimise any change in the power dynamics of that relationship.

Constitutional Theory and the fluctuations of Judicial Power

The Rule of Law

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[25]Paterson, *The Law Lords*, n23, p3

[26]Paterson, *The Law Lords*,n23, p3

[27]The House of Lords Select Committee acknowledged the need for research into the public's perception of the judiciary which goes beyond perceptions based on the media and whether judges are trusted to carry out their role. HL 151, n5, paras 141 and 144 (citing the evidence of Professor Dame Hazel Genn)

[28]Lord Phillips has specifically acknowledged the use of these two mediums to explain the role of the court to the public. See 'Judicial Independence & Accountability: A View from the Supreme Court', (UCL Constitution Unit Lecture, 8 February 2011), p20. http://www.supremecourt.gov.uk/docs/speech_110208.pdf> accessed 25 February 2016

The judicial commitment to the values inherent in the rule of law is often used to legitimise judicial power. The rule of law is a constitutional principle that escapes a universally accepted definition, with some believing that it includes substantive values[29] and others merely formalistic qualities.[30] This conceptual uncertainty leaves it open to possible abuse by state institutions[31] however s1 of the CRA recognises the enduring nature of the principle and endorses the values it enshrines for the constitution by placing it on a statutory footing.[32] The complexity involved in attempting to define the principle was avoided by maintaining the 'existing' constitutional principle.[33] Statutory 'recognition' is not the same as statutory 'creation' and the rule of law remains a constitutional principle rather than a creature of statute. A constitutional principle runs deeper than the surface of a statute and may not be removed by Parliament using either implied or express repeal.[34] This immunity from Parliamentary repeal provides the rule of law with a more solid constitutional base to found judicial power than that afforded to judges under statute; 'constitutional'[35] or otherwise.

The inherent potential of the rule of law in the UK constitution was demonstrated in *Jackson v HM Attorney General*[36] where it was suggested *obiter dictum* that the rule of law, as safeguarded by the judiciary, acts as a limiting force on an otherwise sovereign Parliament. Lord Steyn recognised that 'the supremacy of Parliament is still the general principle of our constitution', but that it may no longer be regarded as the absolute principle under a new definition of 'constitutionalism' in the UK. In this sense, 'the classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom.'[37] Lord Hope agreed that 'Parliamentary Sovereignty is no longer, if it ever was, absolute' and 'step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.'[38] Lord Hope went on to identify the rule of law, as enforced by the courts, as the 'ultimate controlling' factor on which the UK

[29]One of the main advocates of a substantive concept is TRS Allan. See TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (OUP, 1993); *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, 2001)
[30]See Jowell, 'The Rule of Law and its underlying Values' in Jowell and Oliver (eds) *The Changing Constitution* (OUP, 2007)
[31]See JAG Griffiths, 'The Political Constitution', n4, 15
[32]s1 states that 'This Act does not adversely affect— (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle.'
[33]Lord Bingham attributed the difficulties in creating a statutory definition to the inability to be 'succinct' and 'accurate' in how one describes the rule of law. See Bingham, 'The Rule of Law' (2007) 66 CLJ 67, 68
[34]See obiter comments of Lords Mance and Neuberger in *R (HS2)*, n14 [207]. Dworkin famously distinguished principles from rules as a set of moral standards that are an integral part of the law and assist judges in their decision-making. See Dworkin, *Taking Rights Seriously* (Duckworth, 1977)
[35]*Thoburn v Sunderland City Council* (per Laws LJ), n11
[36]*Jackson,* n10
[37]*Jackson,* n10 [102]
[38]*Jackson*, n10 [104]

constitution is based.[39] Lady Hale also revealed the lengths that the courts would go to in order to uphold the rule of law in that 'the courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law … '.[40]

The transition to the Supreme Court did little to quell Lord Hope's belief in the rule of law as the fundamental principle of our constitution, referring to it in *Axa*, as the 'guiding principle'.[41] The issues therein went 'to the root of the relationship between the democratically elected legislatures and the judiciary' as well as considering 'the part which the rule of law … has to play in setting the boundaries of this relationship.'[42] The Supreme Court found that Acts of the Scottish Parliament were subject to common law judicial review under the guiding principle of the rule of law[43] or when fundamental rights are breached.[44] The case was significant in demonstrating the power of the rule of law to authorise a form of review, falling short of full judicial review, of a legislative body that was elected on a democratic mandate and which possessed 'plenary'[45] powers within its competencies. That said, the *obiter* remarks made in *Jackson* remain untested given that the Scottish Parliament is not a *sovereign* legislature and is subject to statutory review by the Supreme Court.[46]

The Steyn-Hope-Hale axis of thought in *Jackson* is by no means representative,[47] nevertheless the *obiter* comments hint that some members of the senior judiciary regard the rule of law, under judicial guardianship, to be the dominant principle in the modern UK constitution. To date, the *Jackson* remarks remain the strongest statements of Parliamentary Sovereignty's subservience to the rule of law.[48] Parliamentary Sovereignty appears to have lost its Diceyan immunity to external limitation in the modern constitution, in particular from the rule of law.[49] This view has also gained traction in academic scholarship with Allan believing that 'it is the rule of law that is truly absolute, constituting the basis of the legal order within which legislative sovereignty must be located and

[39] *Jackson*, n10 [107]
[40] *Jackson,* n10 [159]
[41] *AXA General Insurance Limited v The Lord Advocate (Scotland)* [2011] UKSC 46 [51]
[42] *AXA,* n41 [42] (per Lord Hope)
[43] *AXA,* n41 [47]
[44] *AXA,* n41 [149]
[45] *AXA*, n41 [147] (per Lord Reed)
[46] s33(1) and Sch 6 Scotland Act 1998 as amended by s 40 and sch9 CRA 2005
[47] See Lord Neuberger 'Who are the Masters Now?' (Lord Alexander of Weedon Lecture, 6 April 2011) <www.webarchive.nationalarchives.gov.uk/20131202164909/http:/judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-weedon-lecture-110406.pdf> accessed 22 February 2016 and T Bingham, *The Rule of Law* (Penguin Books, 2011), 167
[48] Lord Phillips referred to the rule of law extra-judicially as 'the bedrock of a democratic society'. See 'Judicial Independence & Accountability', n28
[49] Lords Mance and Neuberger were clear that principles 'fundamental to the rule of law' are arguably no longer capable of implied repeal by Parliament . See *R (HS2)* n14 [207]

defined.'[50] Furthermore, McGarry considers Parliamentary Sovereignty as more akin to a Dworkian principle than a rule and that statutory law can be weighed against competing principles by assessing the import of each and the level of infringement.[51] Professor Hart was the closest of the legal philosophers to recognising that law was above parliamentary power. Hart theorised that a higher order of law existed in the UK which he termed the 'rule of recognition' and that this principle of legality constrained what Parliament could do.[52] The *Jackson* obiter remarks appear to alter Hart's doctrine from the fundamental nature of the rule of recognition to the fundamental nature of the rule of law which limits an otherwise sovereign Parliament.

The idea that the rule of law constitutes a higher order law corresponds with Lord Woolf's extra judicial commentary. He believed that 'as both Parliament and the courts derive their authority from the rule of law so both are subject to it and cannot act in manner which involves its repudiation.'[53] Woolf's constitutional philosophy strips Parliament of a defining feature of its sovereign power, that of being positioned above the law. Indeed this was one of the dual concepts of sovereignty professed by Hart,[54] alongside the 'habit of obedience' of the subjects of the state. In a post-*Jackson* world, Parliament only definitively possesses the latter. A modern 'hypothesis' of 'constitutionalism'[55] may have to account for a weakening in command of Parliamentary Sovereignty over the constitution and recognise that it, as well as the courts, are limited by standards imposed on it by the rule of law. The judges are therefore custodians of what may be regarded as the superior 'limiting' constitutional principle in the UK.

The rule of law's character as a limiting rather than an empowering constitutional principle restricts its ability to replace Parliamentary Sovereignty as the dominant principle in the constitution. The courts command the 'habitual obedience' of UK citizens and state institutions to the common law, developed over the course of successive judgments in a Hartian sense, however Parliament still has the power to legislate to avoid the effects of a judgment.[56] Furthermore, from a Diceyan perspective the court cannot 'make' or 'unmake' any law. The judicial role is reactive as opposed to active with little power to direct law reform through controlling the court's caseload.[57] This narrow remit for law reform is compounded by the judges avoiding making generic and widespread pronouncements on

[50]TRS Allan, *Constitutional Justice; A liberal theory of the Rule of Law*, n29, p201
[51]J McGarry, 'The Principle of Parliamentary Sovereignty' (2012) 32(4) LS 577
[52]HLA Hart, *The Concept of Law* (OUP, 1961)
[53]H Woolf, 'Droit public- English Style' [1995] PL 57, 68
[54]Hart, *The Concept of Law*, n52 p49-50
[55]See *Jackson* (per Lord Steyn), n10 [102]
[56]See *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75
[57]Exceptionally, the declaration of incompatibility under s4 HRA or breaches of the Convention have instigated Parliamentary action in all but one instance: *Hirst v UK (No 2)* (2006) 42 EHRR 41

the area of law before them, instead containing their review to the specific arguments raised by counsel and tested in the courtroom.[58] The untrammelled potential for legislation to be reviewed, tested, 'controlled'[59] and even 'rejected'[60] by the judges acting under a 'different hypothesis of constitutionalism'[61] in a post-*Jackson* world needs to be treated with caution. It gives the impression that the rule of law possesses equal or even superior strength to the longstanding doctrine of the Sovereignty of Parliament. The fallacy of this view has been raised by certain commentators,[62] believing it respectively to misrepresent the jurisprudential basis of the Westminster model,[63] to empower the legal opinion of the judiciary without any democratic sanction or accountability[64] and to assume the strength of the rule of law when it has in fact weakened in the face of Parliamentary Sovereignty as a result of increased national security and strict counterterrorism measures.[65]

Knight provides a different view of the sovereign power of courts, which is achieved not through curtailing and restricting Parliament's sovereign power under the mandate of an alternative legitimate constitutional principle but rather by sharing sovereign power with Parliament. Knight aligns two existing academic arguments for split sovereignty and contextualises them within the realities of the UK constitution.[66] The first is Sir Stephen Sedley's extra-judicial support for dual sovereignty; legally the Crown is present in the courts, politically the Crown is present in Parliament and the executive is answerable to both.[67] The second is Rees' functional distinction between legal and coercive sovereignty, although Knight attributes 'coercive' sovereign power to the courts rather than the armed forces or the police, as Rees suggests.[68] Knight merges Rees' and Sedley's concepts of dual sovereignty by viewing sovereignty in a functional manner and arguing that UK pragmatism results in the courts and Parliament having both *coercive* and *legal* sovereignty; the difference lying

[58] See discussion in Chapter 5 at n146
[59] *Jackson*, n10 [107](per Lord Hope)
[60] *Jackson*, n10 [159] (per Lady Hale)
[61] *Jackson*, n10 [102] (per Lord Steyn)
[62] R Ekins, 'Judicial Supremacy and the Rule of Law' (2003) LQR 127; KD Ewing and JC Tham, 'The continuing futility of the Human Rights Act' [2008] PL 668
[63] R Ekins, 'Judicial Supremacy and the Rule of Law', n62, 135
[64] R Ekins, 'Judicial Supremacy and the Rule of Law', n62, 144-145
[65] KD Ewing and JC Tham, 'The continuing futility of the Human Rights Act', n62, 670
[66] CJS Knight, 'Bi-Polar Sovereignty restated' (2009) 68(2) CLJ 361
[67] CJS Knight, 'Bi-Polar Sovereignty restated', n66, 365, citing Sir Stephen Sedley, 'Human Rights: a Twenty-First Century Agenda' [1995] PL 386, 389. Sedley's belief in the divisibility of the Crown was originally put forward in his argument on behalf of the appellant in *M v Home Office* [1992] QB 270
[68] CJS Knight, 'Bi-Polar Sovereignty restated', n66, 368-370 citing WJ Rees, 'The Theory of Sovereignty Restated' (1950) 59 Mind 495

in the sovereignty that is exercised customarily and the sovereignty that is the exception.[69] This, he believes, is a 'more plausible' theoretical conception of state power in the UK which reflects our pragmatic constitutional heritage founded upon realism and only a partial subscription to the separation of powers.[70] Knight is not alone in his belief of the divisibility of sovereignty. Allan approves of Lord Bridge's observations in *X Ltd v Morgan Grampian (Publishers) Ltd*[71] where he recognised that the rule of law divides sovereignty between the Queen in Parliament and the Queen in the courts; one 'making the law', the other 'interpreting and applying the law.'[72] Allan goes on to argue that,

> the idea of absolute legislative power is ultimately plausible only on the assumption that enactments can (or should) be 'literally' applied, without interpretation abstracted from the controlling influence of transcendent constitutional values.[73]

The dual sovereignty perspective is not without its critics[74] but remains useful on two levels. Firstly, it provides an alternate way of viewing judicial power before the CRA, without necessarily subscribing to the view that the courts are enforcers of a fundamental concept of law to which the sovereign legislature must also be subject. Secondly, it demonstrates the utility in taking a realist approach to examining the institutional paradigm within the UK constitution. Theory must be anchored in the realities of how the institutions in the UK *actually* share power. This thesis subscribes to the realist approach to constitutional research by providing systematic empirical data to ground the more speculative theory on whether the final appeal court is becoming a more powerful institution.

This section has demonstrated that the rule of law is *a* fundamental if not *the* fundamental principle in the UK constitution. It is clear that the judiciary has already acquired significant constitutional power through being custodians and defenders of the rule of law. The dual sovereignty writings take this further and collectively believe that in *enforcing* and *interpreting* the legal will of the Crown, the judiciary share sovereignty. Even more recently the 'power' and 'status' acquired by the Supreme Court has led to commentators suggesting that the court should be recognised in exceptional

[69]For Parliament legal sovereignty is the norm, with the limited coercive and enforcement powers granted to it under the Bill of Rights 1689 being the exception. For the Courts, coercive sovereignty through enforcement of the law is the norm, with limited law making powers being the exception. CJS Knight 'Bi-Polar Sovereignty restated', n66, 373-374

[70]CJS Knight, 'Bi-Polar Sovereignty restated,'n66, 361-362

[71][1991] 1 AC 1, p48

[72]TRS Allan*, Constitutional Justice, a Liberal Theory of the Rule of Law*, n29, p201

[73]TRS Allan, *Constitutional Justice, a Liberal Theory of the Rule of Law*, n29 p202-203

[74]John Allison is the main critic alluded to by Knight. CJS Knight, 'Bi-Polar Sovereignty restated, n66, 377

constitutional cases as 'co-equal to Parliament in the resolution of constitutional disputes.'[75] The authority for this was again premised upon the rule of law, as a 'democratic conception' in the modern constitution that 'conceives and legitimates the constitutional role of the Supreme Court as a counter-majoritarian institution.'[76]

It is clear that the fundamental nature of the rule of law provides a clear judicial mandate to check state institutional power, which is achieved through the *judicial review* of public decision-making to ensure the legality of those decisions.[77] Judicial power in this field can be gauged by avenues of review open to the court as well as the breadth of the grounds for review. In countries with a written constitution, constitutional review is permitted, or inferred, under the authority of the constitution. In the UK, the judiciary has established powers of review under the common law. The next section will examine the growth in judicial power as a result of the expansion of common law judicial review before examining powers of review under the HRA.

Judicial Review

Judicial review is concerned with the legality of an administrative decision; a legitimate public decision must be taken in accordance with the law, as enacted by Parliament. Judicial review is closely related to the rule of law in that the former gives effect to the latter.[78] The decision must follow a due process and be procedurally fair. Judicial review in public decision-making entered its developmental phase in the 1950s and 1960s[79] following the leading decision of *Associated Provincial Picture Houses Ltd v Wednesbury Corpn*.[80] Lord Greene MR, in *Wednesbury,* was clear on where the boundaries of the judicial review lay. A court could not substitute its own decision for that of the public body. Instead, it is merely concerned that the public body has taken into account all of the factors that it is required to take into account, either expressly or by implication, by the primary statute conferring the discretion.[81]

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[75] R Masterman and J Murkens, 'Skirting Supremacy and subordination; the constitutional authority of the United Kingdom Supreme Court [2013] PL 800, 809

[76] Masterman and Murkens, 'Skirting Supremacy and subordination', n75, 809

[77] Any attempt to oust the courts' powers of review would be seen to undermine the rule of law and is likely to be rejected by the judiciary. See Lord Woolf, Droit Public, n53, p68 and 69 and *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 170

[78] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and Regions* [2001] UKHL 23 [73] (per Lord Hoffman)

[79] The three main cases arising in this decade were *Ridge v Baldwin* [1964] AC 40; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and *Anisminic*, n77

[80] [1948] 1 KB 223, [1947] 2 All ER 680, CA

[81] *Wednesbury*, n80

Judicial review has developed since the 1950s and expanded upon traditional *Wednesbury* grounds. This expansion is partly owing to the scale of modern day government,[82] and partly owing to the judicial acceptance of a wider platform of review.[83] Foremost amongst the innovations has been the adaption of the *Wednesbury* test where decisions affect the rights of an individual, to allow for a more heightened form of scrutiny.[84] Subsequently, the HRA provided the legislative sanction to move beyond traditional heads of judicial review to proportionality review where the rights of an individual were concerned. This was evident in *R v. Secretary of State for the Home Department, ex p Daly*[85] which is accepted by commentators as having adopted a proportionality-based test of substantive review where human rights are involved.[86] Lord Steyn, in *Daly*, clearly set out the differences that proportionality-based review would encompass. For a start, the 'intensity of review is somewhat greater under the proportionality approach'.[87] He explained that,

> the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.

He confirmed that this 'may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.' He also noted that,

> the intensity of the review … is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.[88]

The significance of the proportionality principle being adopted by the judges is its capacity to expand the platform of substantive review and take the judges closer to reviewing the merits of a decision. *Wednesbury* was criticised as symbolic of the post-war unwillingness for the judiciary to review cases

[82] Bingham, 'The Rule of Law' n33, 78
[83] A situation which Lord Neuberger feels demonstrates 'the value in controlled judicial activism.' See Neuberger, 'Who are the Masters Now?', n47, para 72
[84] *R v Ministry of Defence ex parte Smith* [1996] QB 517 [554E-G]
[85] [2001] UKHL 26
[86] T Poole, 'The reformation of English Administrative law' [2009] 68(1) CLJ 142, 146; T Hickman, 'The Substance and Structure of Proportionality' [2008] PL 694, 694
[87] *Daly*, n85 [27]. See also P Sales, 'Rationality, Proportionality and the development of the law' (2013) 129 LQR 223, 226; TRS Allan, 'Human Rights and Judicial Review: a critique of "due deference"' (2006) 65(3) CLJ 671, 679 respectively
[88] *Daly,* n85 [27]

on substantive grounds in all but the most extreme instances of public behaviour[89] and as encouraging only 'pragmatic intervention' from the judiciary.[90] Poole notes that the proportionality principle is currently unlimited in the way that the *Wednesbury* reasonableness test inherently was and secondly, it moves the focus of the court from the 'reasonableness' to the 'proportionality' of the decision affecting the rights of an individual. What is reasonable may not be proportionate.[91] Lester and Jowell, however, feel that the principle of proportionality acts as a greater safeguard against surreptitious political decision-making by the judges. In their opinion, adoption of the proportionality standard is actually a clearer articulation[92] of the legal principle that governs judicial review, namely that public officials must not exceed the limits of the powers conferred on them, and moves away from the vagaries of *Wednesbury,* which can serve to obscure judicial economic and social agendas.[93] Poole, on the other hand, believes that proportionality has the capacity to be equally as vague as *Wednesbury* unreasonableness, however concedes that it is more transparent and 'at least encourages judges to show their workings out'.[94]

Whereas some commentators view proportionality review as part and parcel of UK administrative law and clearly envisage its further expansion, others do not feel that it is a permissible development in the common law. In the former camp, Poole has commented that 'the normative assumptions that underpin proportionality' based review are not containable within the rights realm and instead 'have the capacity to spill over into other areas of judicial review where rights are not necessarily directly in play.'[95] In the latter camp sits Sir Philip Sales, who recently reviewed the current state of administrative law with a view to establishing whether the *Wednesbury* based principle of rationality should be replaced by the principle of 'proportionality'.[96] He was clear that this had not already occurred and that, unlike rationality, Parliament had not accepted the constitutional check that proportionality represents.[97] Sales felt that the incorporation of proportionality-based review would alter the institutional power balance in the UK[98] through creating stronger powers of review for the courts that narrow the breadth of discretion enjoyed by public bodies.[99]

[89]Poole, 'The reformation of English Administrative law', n86, 143
[90]Lester and Jowell, 'Beyond Wednesbury: substantive principles of administrative law' [1987] PL 368, 368
[91]Poole, 'The reformation of English Administrative law', n86, 146-147
[92]This was reiterated by Lord Steyn in *Daly*, n85 [27]
[93]A Lester and J Jowell, 'Beyond Wednesbury: substantive principles of administrative law' [1987] PL 368, 381
[94]T Poole's views in 'Tilting at windmills? Truth and illusion in "The Political Constitution"' (2007) 70(2) MLR 250, 268
[95]Poole, 'The reformation of English Administrative law', n86, 147
[96] Sir Philip Sales, 'Rationality, Proportionality and the development of the law' (2013) 129 LQR 223
[97]Sales, 'Rationality, Proportionality and the development of the law', n96, 230
[98]Sales, 'Rationality, Proportionality and the development of the law', n96, 225
[99]Sales, 'Rationality, Proportionality and the development of the law', n96, 226

The principle of proportionality has the capacity to grant more power to the judges as it involves a balancing of rights as well as a consideration of legitimate expectations and therefore subjects a public decision inherently to a more anxious degree of scrutiny than pure rationality. As Poole explains, the courts are more likely to come closer to the merits of the public authority's decision and as a consequence narrow that authority's discretion to act. This narrowing of discretion can also occur in the context of '… cases which involve questions of acute political controversy.'[100] Proportionality would undoubtedly act as a greater check on executive action and, as proffered by Lester and Jowell, could still be democratically acceptable through a clearer articulation of the legal principle of review. A move towards a proportionality principle of review would heighten the legal checks on the executive and shift the paradigm of power in the court's relationship with the executive.

Human Rights and Common Law Rights

The UK constitution enjoys capacity to uphold fundamental rights, either by virtue of the HRA or through the rights recognised in the common law. Upholding specific rights was not traditionally a task for the court and, as outlined below, the mechanics of the HRA have provided the judiciary with a new method of statutory review to ensure that rights are protected across all branches of state. At the same time, the protection of common law rights has also come back to the fore as the Supreme Court has recently indicated that common law rights, reinforced by the Convention, is the primary method of protection of individual rights in the UK.[101] This primacy of common law constitutionalism combined with its perceived democratic legitimacy, as outlined by Laws LJ below, could provide another avenue for a legitimate increase in judicial power within the constitution.

Common Law Rights

The common law is both created and enforced by the judiciary and enjoys a deep rooted constitutional pedigree. It is a product of progressive 'judgment and opinion' that is continually evolving and has been recognised as having institutional features that support a degree of judicial creativity.[102] The common law is generally regarded as secondary to statute law and can be overruled by express statutory language. Some common law theorists, however, would position the common law more fundamentally in the UK constitution and believe that common law values shape

[100]Laws, 'Law and Democracy', n7, 74
[101]Stephenson, 'The Supreme Court's renewed interest in autochthonous constitutionalism', n14

and define sovereign power. Laws LJ believes 'sovereignty is a common law construct' and that 'the doctrine has been honed and conditioned by the common law'.[103] He refers to the 'nuanced' nature of legislative power, enjoying strength in fields such as defence and economics, yet subject in other areas to moderation and interpretation by the values of the common law.[104] Inherent in the common law are rights and principles that are fundamental to the constitution and the vindication of these rights has the potential to constrain legislative power. Laws LJ states,

> where a clash seems to loom between the claims of the sovereign legislature and those of deep individual rights, it will time after time be resolved by recourse to interpretation, and therefore by the methods of the common law.[105]

Laws LJ regards the fundamental rights and values inherent in the constitution to be the 'axiom'[106] of our constitution; the primary feature on which everything else is based and a higher order of law which sets out the framework for all other laws.[107] He believes that true democratic power recognises genuine limits and that rights form a higher order of law, with which 'no government can tamper'.[108] On this reading, the UK courts properly guard the 'apolitical'[109] values and freedoms which are unobjectionable to democratic institutions.[110]

In the HRA era, it could be said that common law rights and values have lost their import however the opposite appears to be the case. Michael Kirby notes that,

> the grafting onto the common law systems of the notions of fundamental human rights has introduced a new, and legitimate, stimulus to creativity in judicial lawmaking.[111]

Lord Reed recently commented on the continued importance of the common law in light of the HRA. He cited his judgment in *Osborn* and stated that the rule of law requires domestic law to

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[102]These features include homogenous judicial appointments from a narrow group sharing similar views, the need to anchor decisions with reasoning and the ability to dissent. See M Kirby, 'Judicial Activism', Hamlyn Lectures (Sweet & Maxwell, 2004), p17-18.
[103]LJ Laws LJ, 'The Common Law Constitution', Hamlyn Lectures (CUP, 2014) p11
[104]Laws, 'The Common Law Constitution',n103, p28-29
[105]Laws, 'The Common Law Constitution', n103, p28-29
[106]Laws, 'Law and Democracy', n7, 75 and 76
[107]Laws, 'Law and Democracy', n7, 87
[108]Laws, 'Law and Democracy', n7, 85
[109]Laws LJ's argument has been criticised for its assumption that there is a set of universally agreed 'apolitical' rights and values that judges can rely upon. See Ekins, 'Judicial Supremacy and the Rule of Law', n62, 139-141
[110]Laws, 'Law and Democracy', n7, 93
[111]Kirby,' Judicial Activism', n102, p67

substantiate the generic nature of Convention rights.[112] The common law provides national context to important Convention principles such as that of proportionality. The balancing exercise under the principle of proportionality cannot be divorced from social values in the national context, which the domestic courts are better positioned to assess than the ECtHR.[113] Reed refers to the long standing pedigree of the common law and the rights it contains, which have been influenced by the judgments of many top courts around the world. He concludes that,

> one would expect that the requirements of the Convention can usually be met by our domestic law, developed by the courts if need be, without having to rely specifically on the Human Rights Act.[114]

The common law filter that applies to statutory law and Convention rights alike clearly provides the judiciary with an important role in interpreting, contextualising and substantiating statutory law in a way that is compliant with the common law's inherent rights and values. There is clear potential for judicial power and influence to increase as the final word on the way that these statutory instruments are implemented appears to lie with the judiciary, as authors and enforcers of a strengthened and emboldened common law.

The HRA

The enactment of the HRA brought domestic remedies to bear for a violation of the fundamental rights and freedoms protected by the Convention and in doing so made justiciable issues that were previously regarded as political or exclusively under the remit of the executive and/or Parliament.[115]

The mechanics of the HRA allocate power to specific branches of government. The Act is designed to retain Parliamentary Sovereignty in that a minister introducing a bill to Parliament, and thus Parliament itself, is still free under s19 to legislate incompatibility with the Convention rights. Furthermore, the judiciary cannot strike down primary legislation and instead can merely declare legislation to be incompatible under s4. If such a declaration of incompatibility is made, the legislation remains enforceable[116]and it is for the Minister concerned to develop a suitable course of

[112]*Osborn,* n14 [56-57];Lord Reed, 'The Common Law and the ECHR' (Inner Temple Lecture, 11 November 2013) <www.innertemple.org.uk/downloads/members/lectures_2013/lecture_reed_2013.pdf>accessed 22 February 2016, p9
[113]Reed, 'The Common Law and the ECHR,' n112, p8
[114]Reed, 'The Common Law and the ECHR', n112, p14-15
[115]House of Lords Select Committee on the Constitution (HL 151), n5, para 32 (citing evidence of Professor Anthony Bradley , Professor Vernon Bogdanor and Charles Clarke MP).
[116]s4(6) HRA

action in order to remedy the defects.[117] The HRA retention of Parliamentary Sovereignty is, however, only one half of the power equation. The Act has been perceived to allocate greater power to the courts.[118] The judicial power of review is evident not only in the ability to make a declaration of incompatibility under s4 but also under s3 HRA, which requires the courts 'so far as it is possible to do so' to give effect to both primary and subordinate legislation in a manner that is 'compatible with Convention rights.' The strength of this interpretative obligation was made clear by Lord Nicholls in *Ghaidan v Godin-Mendoza*[119] when he declared that under s3 a court can, '… read in words which change the meaning of enacted legislation, so as to make it convention-compliant'[120] however in doing so the court cannot, '… adopt a meaning inconsistent with a fundamental feature of the legislation.'[121]

The judiciary's ability to review and interpret primary legislation in this way has been recognised as significant progression from the review mechanisms that the judicial branch possessed prior to the implementation of the HRA.[122] Lord Bingham felt that 'the 1998 Act gives the courts a very specific, wholly democratic mandate' and endorsed Jowell's comments that, 'the courts are charged by Parliament with delineating the boundaries of a rights-based democracy.'[123] For those advocates of dual sovereignty, the increased interpretative powers under the HRA are seen to 'emphasize' the nature of power sharing between the courts and Parliament.[124]

The Supreme Court's power as final domestic arbiter on rights based challenges has the potential to be extensive. Nevertheless it is curtailed to a large extent by both sovereignty and the notion of affording due deference to the views of public authorities. The degree of deference in play at any time is instrumental in establishing where the institutional power balance lies in rights-based jurisprudence. The extent to which the court should curtail the powers, granted to it by virtue of the HRA, to determine and uphold rights and assume a level of deference is a matter of acute controversy. Allan, for one, finds no place for a doctrinal notion of deference in a constitutional setting, where highly positivist notions of sovereignty based on democratic will in reality succumb to

[117] s10 HRA
[118] House of Lords Select Committee on the Constitution, (HL 151), n5, para 32 (citing evidence of Professor Anthony Bradley , Professor Vernon Bogdanor and Charles Clarke MP). See also KD Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62(1) MLR 79, 92
[119] [2004] UKHL 30
[120] *Ghaidan*, n119, [32]
[121] *Ghaidan,* n119, [33]
[122] See *A v Secretary of State for the Home Department* [2004] UKHL 56 [145] (per Lord Scott); F Klug, 'The Human Rights Act- a "third way" or "third wave" bill of rights' [2001] EHRLR 361, 370
[123] See *A*, n122, [42] citing J Jowell, 'Judicial Deference: servility, civility or institutional capacity?' [2003] PL 592, 597
[124] Allan, *Constitutional Justice, A Liberal Theory of the Rule of Law*, n29, p226

the liberal notions of respect for fundamental constitutional rights, the content of which are not exclusively determined by the legislature or the elected executive.[125] He feels that,

> the only 'deference' called for, in a liberal democracy worth the name, is obedience to rules or decisions that comply with the constitutional constraints that competent legal analysis identifies.[126]

Allan flips deference on its head and encourages state institutions to defer to independent constitutional rules as enforced by the judiciary, being the masters of 'competent legal analysis'. Part of Allan's 'competent legal analysis' is being aware of the proper limits of judicial review based on the *Wednesbury* rationality standards or the proportionality principle in the review of rights. Provided a judge follows such judicial review principles, he or she will naturally respect the competences of each institution to the extent that Allan does not regard there to be a need for a separate notion of deference.[127] Too extensive an amount of deferential behaviour would, according to Alan, weaken the powers of the court to review matters and provide independent judgment. He states, 'due deference turns out, on close inspection, to be non-justiciability dressed in pastel colours.'[128]

Allan promotes a realist perspective to tracking current deference levels. This can be seen in his rejection of the attempt to provide normative guidance on the levels of deference through articulating general principles.[129] Instead, he is in favour of examining how the judge actually makes decisions based on the facts in the case and the appropriateness in the circumstances of intervening with the decision of a democratically elected body.[130] Abstract notions of deference should be abandoned in favour of looking at the context of the case. Although Allan dismisses the concept of 'deference', he does appear to indicate that a judge should decide the levels of intervention appropriate, by examining the facts and applying rule of law standards and principles of review in any given case to reach their judgment. Allan fails to acknowledge that the level of intervention required by the courts in any given case is really just the flip side of the level of deference required.

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[125]Allan, 'Human rights and judicial review', n87, 673. Note that the juxtaposition between 'democratic positivism' vs 'liberal constitutionalism' that Allan uses in his critique of deference originates in Murray Hunt's work that Allan cites at p672. M. Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference"' in N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford, 2003), p. 339.

[126]Allan, 'Human rights and judicial review', n87, 673

[127]Allan, 'Human rights and judicial review', n87, 679-680

[128]Allan, 'Human rights and judicial review', n87, 689

[129]Laws LJ attempted to do this, based on source of institutional opinion, institutional responsibility and expertise as well as the nature of the right in *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] EWCA Civ. 158, [81]-[87]

[130]Allan, 'Human rights and judicial review', n87, 674

He thereby implicitly acknowledges that there is a 'deferential' or 'interventionist' balance to be struck in any given case but that this should be determined in the realities of the context of the case rather than by abstract principle. Allan therefore rejects any abstract normative doctrine of deference and instead proposes an alternative of contextual interventionism.

Poole uses Alain Badiou's poles of 'unity' and 'totality' to outline the poles of opinion on deference. The 'unity' movement regard rights as an extension of the rule of law, the determination of which is exclusively within the domain of the courts. Poole, however, favours the 'totality' view, which, by contrast, takes a more 'empirical' perspective and respects the institutional and social context within which administrative decisions affecting rights take place. The court is just one institution with a view on matters and the applicant's rights are just one of many considerations to be taken account of, albeit that the court has an important role and the applicant's rights are an important consideration which may take priority over other considerations.[131] Poole therefore favours the realist 'totality' approach when assessing true rights-based power and levels of institutional deference by the courts. Rights based theory is contextualised in the realities of the constitution and takes account of the complexities involved in administrative decision-making.

The mechanisms of review under the HRA, together with the belief that the courts are 'charged by Parliament with delineating the boundaries of a rights-based democracy,'[132] allow for a growth in judicial power in rights-based cases. The notion of deference to other institutions' views and the belief that other state institutions have a valid perspective that needs to be accounted for, to some extent, limits judicial power. The extent of the deference afforded to other institutions' views is central to gauging judicial power and will be referred to in Chapter 4; the institutional relationship with the branches of state. As with Knight's doctrine of bi-polar sovereignty, TRS Allan's critique of deference in a liberal constitution and Poole's 'totality' view of deference recognise the value in avoiding abstract principles to make pronouncements on deference and instead favour an empirical, contextual approach to capture the true institutional power dynamics between the executive and the judiciary. It appears that be it right-based powers, levels of deference or power sharing via bi-polar sovereignty, institutional power dynamics in the UK constitution demand realist empirical foundations.

The Separation of Powers and Judicial Independence

[131] Poole, 'The reformation of English Administrative law,' n86, 164-165
[132] See n123

The final constitutional theoretical doctrine that requires attention is that of the separation of powers. The separation of powers is also closely associated with the rule of law, which demands an independent judiciary free from external pressure in order to uphold the legal order.[133]

The UK was fairly successful at preserving judicial independence and this had weakened the argument for adopting the formalist constitutional model of a fully separated judiciary.[134] The CRA, nevertheless, sought to enhance both personal and institutional judicial independence. As well as creating an institutionally independent final appeal court, it created a statutory safeguard for judicial independence in s3 CRA[135] and a statutory duty for the Lord Chancellor to defend the independence of judges.[136] Malleson welcomed s3 CRA as the first step in moving from a 'pragmatic' to a more 'principled' approach to judicial independence[137] and transforming a political obligation to respect judicial independence into a legal obligation to do so.[138] Furthermore, the more formal approach to institutional independence protects the judiciary from external influence by ensuring independent processes for judicial appointments, discipline and dismissal, an independent body to set judicial salaries and allowing a degree of financial and administrative independence.[139]

The institutional separation of the court could also assist in underlining the constitutional legitimacy of its review powers which, as outlined above, have expanded in recent decades. The executive is now 'the most frequent litigator in the courts,' contributing to the need for the judiciary to be seen to be free, in particular, from executive pressure.[140] Webber would take the effects of institutional separation on the powers of review further and has suggested that the creation of a Supreme Court could be another step towards 'a constitutionally limited form of government, one subject to full judicial review of democratic decision-making on the basis of constitutional limitations.'[141] Webber believed that parliamentary primacy was reinforced by the highest appellate court being a

[133]Phillips, 'Judicial Independence & Accountability',n28, p1

[134]K Malleson, 'Modernising the Constitution: completing the unfinished business'(2004) 24(1/2) LS, 124

[135]s3(1) CRA 2005 ensures that 'The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.' s3(5) states that 'The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary' and s3(6) ensures that the Lord Chancellor must have regard to (a) the need to defend [judicial] independence; (b) the need for the judiciary to have the support necessary to enable them to exercise their functions and (c) the need for the public interest in regard to matters relating to the judiciary or otherwise in the administration of justice to be properly represented in decisions affecting those matters.

[136]See Lord Chancellor's oath in s17 CRA 2005.

[137]Malleson, 'Modernising the Constitution', n134, 126

[138]K Malleson, 'The Effect of the Constitutional Reform Act 2005 on the Relationship between the Judiciary, the Executive and Parliament', Appendix 3, House of Lords Select Committee on the Constitution (HL 151), n5.

[139]Lord Phillips has questioned the level of financial independence of the court; 'Judicial Independence & Accountability', n28, p1-2

[140]Phillips,' Judicial Independence & Accountability', n28, p1-2

[141]Webber, 'Supreme Courts, independence and democratic agency', n20, 55-56

committee of one House of Parliament and by the entire governmental machinery being brought together under a singular institutional head; that of Parliament.[142] Judicial independence in the UK was not necessarily '… about the strict separation of functions but about the creation of institutional friction ... '.[143] By contrast, a formal concept of judicial independence that insists on a distinct judicial branch is '… founded on premises that are fundamentally inconsistent with continued parliamentary supremacy'.[144] Webber has therefore suggested that there could be a 'symbolic' repositioning of the constitutional status of the judiciary in the UK, and, more controversially, that this could open the door to full judicial review that would be in 'the spirit' of that seen in countries with a written constitution.[145]

The recent conclusion of a three year research project into the politics of judicial independence has confirmed that both judicial independence and judicial accountability appear to be stronger following the implementation of the CRA and that the judiciary are more engaged with the political branches of state.[146] The judiciary were found to have become 'a more independent and self-governing branch of government' based on judicial appointments, discipline and the overall running of the court service.[147] Judicial accountability was also stronger both in terms of 'explanatory' and 'culpable' accountability with judges more regularly appearing before Parliamentary Committees.[148] The confirmation of a more democratically accountable and independent court lends further support to the idea that the CRA provided the infrastructure necessary to legitimise and therefore embolden the Supreme Court.

Conclusion

The fluidity of the UK's constitution can accommodate fluctuating levels of judicial power and ultimately a more powerful Supreme Court. This is evident firstly in the judicial ability to operate under the legitimate mandate of the rule of law as a principle of rising and potentially equal import to Parliamentary Sovereignty, secondly through the importance of upholding rights in the contemporary UK constitution following the enactment of the HRA, thirdly in the expanding platform of judicial review and finally through the legitimacy of an institutionally independent and more democratically accountable judicial branch following the enactment of the CRA.

[142]Webber, 'Supreme Courts, independence and democratic agency', n20, 68-69
[143]Webber, 'Supreme Courts, independence and democratic agency', n20, 59
[144]Webber, 'Supreme Courts, independence and democratic agency', n20, 55-56
[145]Webber, 'Supreme Courts, independence and democratic agency', n20, 68-69
[146]R Hazell, 'Judicial Independence and Accountability in the UK have both emerged stronger as a result of the CRA 2005' [2015] PL 198
[147]Hazell, 'Judicial Independence and Accountability in the UK', n146, 201

Before any change in the court's institutional relations can be tracked, the objectives for the Supreme Court need to be reviewed. The blueprint for the court provides an insight into the extent to which the court's role was intended to change and allows a distinction to be drawn between advertent and inadvertent change. Both the legal and political reasons for reform need to be established in order to provide a comprehensive insight the CRA's aims.

The UK Supreme Court; Legal and Political catalysts for change

The CRA substantially allayed any fear of radical redefinition of role by ensuring that there was a significant amount of continuity between the Appellate Committee and the Supreme Court. There was merit to be gained in the Supreme Court retaining substantially the same jurisdiction as the Appellate Committee,[149] as well as the same personnel.[150] These features of the CRA assisted in achieving a smooth transition between the two institutions. The 'reforms' envisaged by the Act were four fold; Part 1 enshrined the constitutional principle of the rule of law in statute, Part 2 made various changes to the role of the Lord Chancellor, the most significant being his/her removal as head of the judiciary;[151] Part 3 created an institutionally independent Supreme Court and Part 4 introduced a Judicial Appointments Commission. Each of these changes had a part to play in achieving the aim of the Government's proposals which, externally at least, was to 'reflect and enhance the independence of the judiciary from both the legislature and the executive.'[152] The final appeal court was to become more 'transparent' and 'independent'.[153] The creation of a Supreme Court appeared to be the next stage in the Labour Government's offensive to 'modernise' the constitution, which began with the HRA and devolution statutes in 1998. Nevertheless, the sudden announcement on 12 June 2003 of the plans to create a Supreme Court, without prior consultation, and which appeared to contradict previous governmental assertions of a commitment to maintaining the 'expertise and experience' that the Law Lords brought to Parliament,[154] led some to question whether the proposals were in fact a political manoeuvre designed to oust Lord Irvine who-

[148]Hazell, 'Judicial Independence and Accountability in the UK', n146, 203
[149]s40 and Sch9 CRA 2005
[150]s24 CRA 2005
[151]s7 CRA 2005
[152]Lord Falconer of Thornton's foreword to the Department for Constitutional Affairs Consultation Paper; *Constitutional Reform: a Supreme Court for the United Kingdom*, CP 11/03, 14th July 2003, p4
[153]*A Supreme Court for the United Kingdom*, CP 11/03, n152, p10
[154]Department for Constitutional Affairs, *The House of Lords-Completing the Reform*,7 November 2001 (Cm 5291), para 81

as an active Lord Chancellor- was viewed by Blair as an obstacle to reform.[155] The Government was therefore keen to demonstrate that the proposals for a Supreme Court had strong support across both legal and political factions.[156]

The Political Case for Reform

The political case for reform was set out in the Department of Constitutional Affairs consultation paper, *A Supreme Court for the United Kingdom*, published in July 2003. Lord Falconer of Thornton, the then Secretary of State for Constitutional Affairs and Lord Chancellor, made clear that the Government's intentions were not motivated by dissatisfaction with the Appellate Committee but rather by the need to separate the judiciary from the legislature and to 'enhance the independence of the judiciary'.[157]

The Government put forward legal and administrative reasons for reform. It began by noting the legal requirements of A6 ECHR which call into question any arrangement that may cast doubt over the independence and/or impartiality of the judiciary.[158] The Government accepted that this concern had prevented the judges from participating fully in the legislature.[159] The Government also commented on the increase in judicial review applications which 'inevitably brought the judges more into the political eye' and added to 'the danger that judges' decisions could be perceived to be politically motivated.'[160] Practically, the Government was acutely aware of the 'cramped conditions' in the Palace of Westminster[161] and the desirability of the court having separate facilities. Politically, however, the Government was quite clear that the constitutional role for the Supreme Court would remain largely unchanged. Parliament would remain supreme and the Supreme Court would not have powers of annulment over legislation akin to those of the US Supreme Court or be able to declare legislation unconstitutional as in European constitutional courts.[162] The Supreme Court's jurisdiction would be the same as the Appellate Committee's with the addition of the JCPC's

[155]See Le Sueur's discussion of the circumstance surrounding the Government's announcement in A Le Sueur 'The Conception of the UK's New Supreme Court' in A Le Sueur, *Building the UK's New Supreme Court, National and Comparative Perspectives* (OUP, Oxford, 2004) and A Le Sueur, 'New Labour's next (surprisingly quick) steps in constitutional reform' [2002] PL 368

[156]Lord Bingham's support was noted following his Lecture of 1st May 2002, 'A New Supreme Court for the United Kingdom' (Constitution Unit, 1st May 2002) <www.ucl.ac.uk/constitution-unit/files/90.pdf> accessed 12 February 2016; *A Supreme Court for the United Kingdom*, n152 p10

[157]*A Supreme Court for the United Kingdom*,n152 p4

[158]*A Supreme Court for the United Kingdom*,n152, p11

[159]*A Supreme Court for the United Kingdom*, n152, p12

[160]*A Supreme Court for the United Kingdom*, n152, p11

[161]*A Supreme Court for the United Kingdom*, n152, p12

[162]*A Supreme Court for the United Kingdom*, n152, p20-21

devolution issue jurisdiction.[163] The remainder of the JCPC's jurisdiction was to remain distinct from that of the Supreme Court in order to respect the fact that the JCPC hears appeals from various independent Commonwealth countries and Crown dependencies and was not solely a domestic court.[164]

The Government's intentions in establishing the court support the design of this thesis and the key themes it explores. Firstly, it was clear that the judiciary's institutional 'relationships' with the other branches of state were to change by being placed on a more 'modern footing' and that the Supreme Court would assist in redrawing the relationship between the three branches of state.[165] Secondly, the enactment of the CRA was to be regarded as the next step in the post-1997 programme of 'accelerated' constitutional reform,[166] with each of the preceding statutes prompting constitutional change and an associated redefinition of institutional relationships.

The Legal Case for Reform

Lord Bingham's Case for Reform

Reform of the House of Lords

Lord Bingham identified three main legal reasons why the time was ripe for reform of the court.[167] Firstly, he saw it as an inevitable extension of the ongoing reform to the composition of the House of Lords. He predicted that the Second Chamber would become smaller in membership and inevitably seek to maximise the utility and skill set of each appointment to the House. Although the Law Lords were not lacking in terms of technical skill, they were found wanting in terms of their participation levels, either through practical constraints on their time or through consciously being aware of compromising their position in later litigation.[168]

Requirements of A6 ECHR

[163] *A Supreme Court for the United Kingdom*, n152, p19-20
[164] *A Supreme Court for the United Kingdom*, n152, p23
[165] *A Supreme Court for the United Kingdom*, n152, p13
[166] See Bogdanor, *The New British Constitution* and King, *The British Constitution,* n16
[167] Bingham, 'A Supreme Court for the United Kingdom', n156, p4
[168] Lord Hoffmann was disqualified from sitting owing to perceived bias following the decision in *R v Bow Street Metropolitan Stipendary Magistrate ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119

Bingham's second reason was the requirement to 'take into account' Convention jurisprudence under s2 of the HRA, which brought the UK's obligations, as a signatory to the Convention, into sharper focus. The Convention jurisprudence had taken a 'stricter view' on matters that actually had an effect on judicial independence and impartiality as well as those which might prompt a perception of independence or bias.[169]

Procola v Luxembourg[170] revealed the emphasis that the European Court of Human Rights ('ECtHR') placed on *appearances*. *Procola* challenged the composition of the judicial committee of the Conseil d' Etat on the basis that some of its members were involved in issuing the advisory opinion relevant to the appeal and the committee was not therefore independent or impartial. The ECtHR agreed with the Commission dissent which had emphasised '… the importance attached to appearances'[171] and that the 'blurred' lines between the judicial and advisory role of the Conseil'd Etat gave rise to a 'legitimate fear' that the applicant's case '… would not be heard by an independent and impartial tribunal within the meaning of Article 6(1) of the Convention.' The Court commented that it was not the *actual* independence of the Councillors which was being questioned[172] but rather the *doubts* over the Conseil's structural impartiality.[173]

Individual impartiality was no longer enough to satisfy A6 ECHR. Parallels could immediately be drawn between the position of the Luxemburg Conseil d' Etat and that of the Law Lords in the House of Lords. The Law Lords could oversee the revision of bills and debate the details of those bills as they passed through the legislative chamber, therefore structural impartiality in the UK was blurred in a way that would *appear* to be unacceptable to the ECtHR.[174]

The decision of *McGonnell v UK*[175] followed that of *Procola*. *McGonnell* raised a successful A6 challenge to the position of the Bailiff of Guernsey who was President of the Royal Court, a professional judge and exercised legislative and executive functions, including presiding over the States of Deliberation. The States of Deliberation had adopted a development plan, the implementation of which was later to have an adverse effect on the applicant. The Bailiff, in his presiding role, possessed a casting but not an original vote on the matters at hand. There was also a

[169]Bingham, 'A Supreme Court for the United Kingdom', n156, p5-6
[170](1996) 22 EHRR 193
[171]*Procola v Luxembourg*, 6 July 1994 (No. 14570/89)
[172]*Procola*, n170 [43]
[173]*Procola*, n170 [45]
[174]This cannot be said with any certainty as ECtHR jurisprudence does not require states to subscribe to a certain theoretical constitutional structure, however at the same time it appears to require formal separation between the branches; See R Masterman, 'Determinative in the abstract? Article 6(1) and the separation of powers' [2005] EHRLR 628
[175](2000) 30 EHRR 289

conventional constraint on the use of the Bailiff's vote so that it would only be used to maintain the status quo. Nevertheless, the ECtHR agreed with the Commission and held unanimously that there had been a breach of A6. The ECtHR made clear that the Council of Europe members were not required by the Convention to subscribe to any particular theoretical concept of the separation of powers, however there had to be a functional guarantee of the rights subscribed to under the Convention.[176]

In a post-*McGonnell* world, the Law Lords' position was open to attack on both independence and impartiality grounds. Firstly their appointment by the Lord Chancellor, who held both executive and judicial functions, was open to question. Secondly, their membership of the legislature arguably clouded the 'appearance of independence', and did not offer a strong enough guarantee of objective impartiality. Indeed, the Bailiff of Guernsey's role in the legislative procedure was of a more removed nature to that of the Law Lords, who each possessed a vote on legislation in the same way as any other member of the House of Lords. If any further confirmation was required of the precarious position that both the Lord Chancellor and the Law Lords occupied in the UK, it was provided when the ECtHR ruled that,

> any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue.[177]

The Decreasing Workload of the Judicial Committee of the Privy Council

The final argument put forward by Bingham for the creation of a Supreme Court was the waning influence of the JCPC. Its workload had gradually reduced over the years, as successive Commonwealth countries gained their independence and professional bodies took control of their respective regulatory proceedings.[178] The JCPC's overseas jurisdiction was a relic of the past and its regulation of professional bodies seemed out of line with the modern trend for regulation of public services either by independent bodies accountable to Parliament, or regulatory bodies specifically

[176] *McGonnell*, n175, [51]
[177] *McGonnell,* n175, [55]
[178] Bingham, 'A Supreme Court for the United Kingdom', n156, p6. Empirical evidence published in a report by A Le Sueur confirmed the reducing number of appeals coming from Commonwealth countries. The absence of appeals from New Zealand and Caribbean States, between November 1996 and November 1999, would have resulted in an average of only 12 appeals per annum going to the JCPC from the remaining independent states, the British Overseas Territories or the British Isles. A Le Sueur, *What is the future for the Judicial Committee of the Privy Council?* (The Constitution Unit Report, UCL London, May 2001), p9

set up to oversee professional services. Bingham felt that the only matter which served to reignite and enlarge the JCPC's gradually decreasing jurisdiction was on the home-front when the Scotland Act 1998 granted the 'devolution issue' jurisdiction to the JCPC as opposed to the Appellate Committee.[179]

Lord Steyn's Case for Reform

Lord Steyn's case for a Supreme Court[180] was not explicitly referred to in the Government White Paper. There was a degree of overlap with some of the reasons put forward by Lord Bingham, however Steyn's arguments for removing the Law Lords from the legislature were underpinned primarily by constitutional theory, as opposed to Bingham's concerns which were linked to the strength of recent Convention jurisprudence and pragmatic considerations following the devolution settlement. Steyn concentrated on the traditional constitutional doctrines of the rule of law and judicial independence, which he believed formed the foundations for the doctrine of the separation of powers.[181] Steyn's argument centred on the premise that the UK lacked the constitutional infrastructure- of a more rigid separation of powers and a clearer perception of judicial independence- necessary to uphold current democratic values. His case for reform was not limited to the Law Lords and also explored the multifunctional position that the Lord Chancellor occupied within the constitution. Steyn did not feel that the two positions were mutually exclusive as he felt that the Law Lords only continued to be part of the legislature to prevent the Lord Chancellor's position within the constitution from becoming anomalous.[182]

Steyn accepted that the separation of powers was a dynamic concept and that the strict form was very rarely ascribed to by any constitutional democracy,[183] nevertheless, the UK was unique in the extent to which it violated traditional separation of powers values:

> Nowhere outside Britain, even in democracies with the weakest forms of separation of powers, is the independence of the judiciary potentially compromised in the eyes of citizens by relegating the status of the highest court to the position of a subordinate part of the legislature.[184]

[179]Bingham, 'A Supreme Court for the United Kingdom', n156, p6. See s103 and Sch6 Scotland Act 1998
[180]J Steyn, 'The Case for a Supreme Court' (2002) 118 LQR 382
[181]Steyn, 'The Case for a Supreme Court, n180, 383
[182]Steyn, 'The Case for a Supreme Court', n180, 383 and 384
[183]Steyn, 'The Case for a Supreme Court', n180, 383
[184]Steyn, 'The Case for a Supreme Court' n180, 383

Steyn also felt that the ability for a serving Lord Chancellor to sit in the Appellate Committee as a judge was, 'not consistent with even the weakest principle of separation of powers or the most tolerant interpretation of the constitutional principles of judicial independence or rule of law.'[185]

Far from leading the democratic world, Steyn felt that the UK was out of step with the modern regard for principles of constitutionalism. He queried the 'democratic legitimacy' of not having a completely separate executive and judiciary.[186] Further still, it seemed inappropriate where the executive was regularly a party to litigation before the courts, for it to continue to have a representative within that court.

Together, Steyn and Bingham highlighted both the legal and constitutional case for a Supreme Court, which undoubtedly fed into the Government's political case for reform several years later. The political and legal case for reform underlined the need to reform the relationship between the judiciary, the executive and the legislature and to increase the perception of an independent judicial branch. The Supreme Court consultation paper, however, made clear that the Government did not intend to create a more prominent role for the final appellate court in the UK. This thesis aims to establish whether, by altering the nature of court's institutional relationships, the inadvertent effect of the reform was to create a more powerful court within the UK constitution.

Chapter Overview

The substantive chapters that follow the Methodology Chapter are outlined below, with the focus of the thesis being the examination of the relative power of the Supreme Court in the time period. It is clear from the data that there are some differences in practice between the Supreme Court and the Appellate Committee, however the most *significant* findings, as regards the administrative efficiency and institutional relationships of the court, relate to the institutional influence of the ECtHR. Consequently, the way that the Supreme Court manages its relationship with the ECtHR in the future is likely to directly impact upon its domestic institutional relationships. The study concludes by suggesting that, on the basis of the results generated by the study, the enactment of the CRA may not have as significant implications for the administrative efficiency and institutional relational dynamics of the UK final appeal court as a future repeal of the HRA would.

Administrative Efficiency of the Court

[185] Steyn, 'The Case for a Supreme Court', n180, 388
[186] Steyn, 'The Case for a Supreme Court', n180, 388

This chapter precedes the substantive review of each of the court's institutional relationships by examining the operational efficiency of the court in the time period. The aim of the chapter is to establish whether the court was in a position to regularly and effectively communicate with each of the institutions that it had a relationship. The analysis compares the average length of case, judgment gap and length of judgment for each final appeal court and identifies any changes in judgment style across the time period. This includes the size of the judicial panels convened, the rate of concurrence and dissent as well as the number of single judgments issued. The results then feed into larger questions relating to the operation of precedent, the clarity of the judgment delivered and the guidance offered to other institutions examined in this study. The significant findings are used to make recommendations as to how the Supreme Court could improve on efficiency and at the same time support institutional relations going forward.

Relationship with State Institutions

The first of the substantive chapters on the court's institutional relations examines the relationship with the political institutions of state; the executive and Parliament. This thesis does not comment on whether it is *desirable* for the court to occupy a more powerful position in its relationship with the executive or Parliament, either under the HRA or, in the case of the executive, under orthodox judicial review[187] and instead curtails its analysis to whether there appeared to be a change in those relationships using either of these review mechanisms.

The Executive

The quantitative data on the executive opens the chapter and has three main foci. Firstly, the data compares executive involvement as between the courts to gauge how often each court was required to review executive action in the time period and thus how often each court was in a position to have a bearing on executive policy. Secondly, the data compares the rate at which the executive was successful to indicate how often the executive was required to rethink its decisions in light of judicial interpretations of the law. Finally, the data develops the findings in chapter 3 by reviewing whether executive involvement had any effect on the administrative efficiency or judgment style of the court.

The chapter progresses by exploring the extent to which cases that involved the executive also involved consideration of ECtHR jurisprudence. The overlap found between cases that involved both

[187] See KD Ewing, 'The futility of the Human Rights Act' [2004] PL 829 and Ewing and Tham, 'The continuing futility of the Human Rights Act', n62. See denouncement of democratic sceptic argument by Lord Bingham in *A*, n122 [42]

the Convention and the executive suggests that institutional relations between the judiciary and the executive are often three-dimensional and are influenced by the jurisprudence of the ECtHR. This finding provides the infrastructure to review the observational data to reveal how the ECtHR appeared to influence judicial-executive relations both within and out-with the Convention context and how it may have subtly affected the characteristics of judicial-executive relations.

The Legislature

The hierarchical relationship between Parliament and the court appeared to characterise the judicial-parliamentary relationship in the time period, as shown in the need for the court to effect the clear institutional intent of the legislature and also in the need to defer any substantive law reform to the democratic and systematic law reforming procedures of Parliament. As a result, the orthodox judicial-parliamentary relationship is reviewed under the headings of 'institutional communication' and 'institutional deference'. The institutional communication section examines the techniques that were used to ascertain and affect legislative intent and to interpret statutory language. The institutional deference section examines how the distinctive law making roles of the judiciary and Parliament interrelated and the extent to which the common law deferred to statutory law in the time period. Given the three-way institutional relational dynamic found in the executive section, the chapter closes by reviewing the effect of the Convention on the orthodox characteristics of the judicial-legislative relationship, in particular whether the orthodox relationship was either reflected or re-characterised by the infrastructure of the HRA.

Relationship with Domestic Courts

The Supreme Court exercises supervisory responsibility over courts in each of the three distinct legal systems within the UK. In England and Wales these courts include the Court of Appeal Civil Division ('Court of Appeal (Civ)'), the Court of Appeal Criminal Division ('Court of Appeal (Crim)') and the High Court. In Scotland it includes the High Court of Justiciary and the Court of Session and in Northern Ireland it includes the Court of Appeal and the High Court.

Chapter 5 begins with a review of the origin of appeals in order to contextualise the data by establishing which lower court had the most interaction with the final appeal court in the time period. The origination of appeals data also allows a comparison to be made between the two final appeal courts to see whether the proportion of appeals from a certain lower court changed following the transition to the Supreme Court. The chapter also develops the preliminary

conclusions reached in Chapter 3 by ascertaining whether the court of origin had an effect on the administrative efficiency of the final appeal court.

The umbrella themes of 'overrule' and 'precedent' are used as a template by which to examine all of the final appeal court's institutional relationships with other legal institutions. The overrule section examines the frequency of overrule for each lower court and how overrule impacted upon the administrative efficiency of the final appeal court and the judgment style used. The quantitative data also measured the circumstance of the overrule, such as whether the lower court was divided and/or followed precedent and whether the involvement of another institution- for instance the executive being a party or the influence of ECtHR jurisprudence being considered- had an effect on rates of overrule. A high overrule rate demonstrates an active and assertive court prepared to declare its view of matters and also evidences a more unstable legal system.

The precedent section aims to gauge the effectiveness of the system of precedent in the time period and how it facilitated institutional relations with the lower courts by helping to minimise overrule and guide them as to the correct legal outcome. The quantitative data on precedent examines which lower court followed precedent most often, and how lower court unanimity, following precedent and overrule each interrelated. The section also examines the effect that the involvement of the executive and the influence of ECtHR had on the lower court following precedent, as well as the effect that the involvement of precedent had on the administrative efficiency of the court.

A separate section is devoted to Scottish precedent to establish how the creation of precedent in Scottish appeals struck the sensitive balance between capitalising on the resource of the English common law whilst being respectful to the integrity of Scots law. The final section also reviews the cases arising under the Supreme Court's new devolution issue jurisdiction to establish how the balance was struck between being sensitive to the Scots' law origin of those appeals whilst determining the important Convention or constitutional issues that arose therein.

Relationship with European Courts

The European Court of Human Rights

The significant findings in the preceding chapters on the effect that the influence of the ECtHR jurisprudence had on the administrative efficiency of the court, the judgment style adopted and the court's institutional relationships, influenced the design of the final chapter. The chapter reviews the statistics on the institutional relationship with the ECtHR to discern further what it was about the

influence of ECtHR jurisprudence that appeared to cause the significant results in the preceding chapters. The pillars of 'overrule' and 'precedent' are again loosely used to review the quantitative data. The 'overrule' section distinguishes between cases that followed, did not follow or were unclear as to the ECtHR jurisprudence and measures how this in turn affected the judgment style adopted and the administrative efficiency of the court. The 'precedent' section examines the average volume of ECtHR citations between each court and whether the fact that the executive was party to the case or the lower court decision was approved, had any effect on the volume of ECtHR citations. The results were then used to refine the preliminary conclusions reached on the significance of the influence of the ECtHR in the preceding chapters.

The European Court of Justice

The relationship between the Supreme Court and the CJEU is slightly different to its relationship with the ECtHR as the Supreme Court is obliged to apply the law as stated in the EC treaties and to interpret national law consistently with EU Law.[188] The enactment of the European Communities Act 1972 (hereinafter the 'ECA') at a 'formal' level was perceived to be 'the most fundamental change to the powers of the top courts in the UK in recent years' however the practical effects on the UK constitution have been reduced by the irregularity with which the ECA is in issue.[189]

The 'irregularity' with which EU matters arise was evident in this study. Only two cases responded to a CJEU reference meaning that no comment could be made on the empirical relationship between the court's response to CJEU references and the effect on final appeal court's domestic institutional relationships e.g. the success of the executive or the overrule of the lower court. Nevertheless, to complete the review of the final appeal court's institutional relationships in the time period, the data on cases that made a reference and declined to make a reference was reviewed under the 'overrule' heading to see how this impacted upon the judgment style and administrative efficiency of the court. Secondly, the data on volume of EU citations was reviewed under the 'precedent' heading to illustrate the difference in the extent of the jurisprudential review of EU cases compared to Convention cases.

[188] s2(1) and (4) ECA

[189] K Malleson in evidence submitted to House of Lords Select Committee on the Constitution (HL 151), n5, Appendix 3.

Chapter 2; Methodology

The law making functions of the final appeal court has been 'surprisingly understudied'[1] and the use of social science methodology to study the operation of the court has, until recently, been unusual in the UK.[2] While the Ministry of Justice publishes official judicial statistics each year, these often do not focus on the final appeal court and have been found to contain discrepancies.[3] By contrast, detailed empirical data on the work of the US Supreme Court is collated and published on an annual basis.[4] The Supreme Court now has a statutory obligation under s54 CRA to publish an annual report, which contains quantitative information on the administrative functionality of the court[5] alongside commentary on the institutional relations with devolved authorities and with European and Commonwealth courts. The report's overview of the Supreme Court's practice aligns with the structure of this thesis and highlights the merit in using both quantitative and observational data to provide a window into the characteristics of the Supreme Court.

This study makes a distinctive contribution to the empirically-informed analysis of the final appeal court by systematically measuring the administrative efficiency and institutional relational dynamics

[1]B Dickson, 'The Lords of Appeal and their Work 1967-1996' in *The House of Lords, Its Parliamentary and Judicial Roles* edited by Brice Dickson and Paul Carmichael (Hart Publishing, 1999), p127. Brice Dickson made reference to the three main works: L Blom-Cooper and G Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon Press, 1972), R Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1880-1976* (Clarendon Press, 1979), A Paterson, *The Law Lords* (Macmillan Press, 1982). Brice Dickson has since then specifically looked at the law making role of both the House of Lords and the Supreme Court in the Human Rights context.; B Dickson, 'Safe in their Hands? Britain's Law Lords and Human Rights' (2006) 26 LS 329 and B Dickson, *Human Rights and the United Kingdom Supreme Court* (OUP, 2013).

[2]Alan Paterson has recently written a follow up to his 1970s study, again using qualitative research methods; *Final Judgment, The Last Law Lords and The Supreme Court* (Hart Publishing, 2013). Shah and Poole have also published a series of articles based on a quantitative analysis of the Law Lords in the Human Rights field. See S Shah and T Poole, 'The Impact of the Human Rights Act on the House of Lords' [2009] PL 347; S Shah and T Poole, 'The Law Lords and Human Rights' (2011) 74(1) MLR 79; Shah, Poole and Blackwell, 'Rights, Interveners and the Law Lords' (2014) 34(2) OJLS 295. Rachel Cahill-O'Callaghan has published two qualitative and quantitative pieces on personal values in judicial decision-making; R Cahill-O'Callaghan, 'Reframing the judicial diversity debate: personal values and tacit diversity' [2015] 35(1) LS 1; R Cahill- O'Callaghan 'The influence of personal values on legal judgments' (2013) 40(4) Brit.J.L. & Soc. 596. Chris Hanretty has conducted quantitative analysis with a political dimension. He examined the policy attitudes of judges covering Appellate Committee decisions between 1969-2009; C Hanretty, 'The Decisions and Ideal Points of British Law Lords' (2013) 43 B.J.Pol.S, 703 and also litigant status and relative success before the Appellate Committee between 1969-2003; C Hanretty, 'Have and Have-nots before the Law Lords' (2014) 62(3) Pol.Stud 686

[3]B. Dickson, The Lords of Appeal and their Work 1967-96, n1, p.140

[4]The Harvard Law Review publishes statistics annually. These statistics record the number of opinions, concurrences and dissents as well as the voting patterns of each judge. They also record unanimity rates, case volume, method of disposal, the appeal origin and its subject matter; 'The Statistics' (2011) 125(1) Harv.L.Rev 362. Each of these factors was also recorded in this study.

[5]The data covers permission to appeal statistics, volume of appeals, number of judgments delivered, result of appeals and number of sitting days. It also provides statistics specifically on the number of references made to the CJEU and the number of cases with larger panel sizes.

of the final appeal court in an important transitional period. The findings not only conclude on the significance of the influence of the ECtHR in the time period, they also identify clear changes in final appeal court practice and institutional relations since the move to the Supreme Court in statistical terms. In this sense the research addresses 'the empirical question of whether the change [to the Supreme Court] will lead to the court exercising more power.'[6] It also provides an empirical review of the effect of the CRA on the final appeal court's institutional relationships to complement the non-empirical research into the effect of the CRA on the court's relationship with the political branches of state.[7] The research identifies trends which cannot be fully substantiated within the current study and may require further examination. Throughout the study supplements, advances and, where relevant, contextualises itself within the findings of the existing empirical studies on the final appeal court that form the methodological foundations of this thesis.

The first of these empirical studies is Blom-Cooper and Drewry's *Final Appeal*.[8] In *Final Appeal*, the authors pointed to the unique social and supervisory role of the Appellate Committee, owing to its generic and wide jurisdiction over both civil and criminal matters.[9] Blom-Cooper and Drewry also recognised the breadth of the error correcting role that the court held; propagated by the precedential nature of the legal system in the UK.[10] The core aim of *Final Appeal* was to provide empirical evidence and significant statistical patterns to support the debates over reform or abolition of the Appellate Committee.[11] The aim of *this* study is not to debate the value of a second-tier appeal court. Instead this thesis seeks to provide empirical evidence and reveal significant statistical patterns to inform the debate over whether the change from the Appellate Committee to the Supreme Court had an effect on the administrative efficiency of the court as well as its relative power in the constitution. Both *Final Appeal* and this study cover a transformative period in the court's history. In *Final Appeal*, it was the 1960s when leapfrog appeals were introduced, the doctrine of *stare decisis* was amended by the *Practice Statement* and criminal appeals increasingly came before the court.[12] Here, it is the four year transitional period covering the move from the Appellate Committee to the Supreme Court.

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[6]K Malleson, 'The evolving role of the Supreme Court' [2011] PL 754

[7]R Hazell, 'Judicial Independence and Accountability in the UK have both emerged stronger as a result of the CRA 2005' [2015] PL 198 presenting the findings of a 3 year AHRC funded research project.

[8]Blom-Cooper and Drewry, *Final Appeal*, n1

[9]Blom-Cooper and Drewry, *Final Appeal,* n1, p413. See text at Chapter 1, n23 for Paterson's conception of the 'role' of the court.

[10]Blom-Cooper and Drewry, *Final Appeal,* n1 p396

[11]Blom-Cooper and Drewry, *Final Appeal,*n1, p5

[12]Blom-Cooper and Drewry, *Final Appeal*, n1, p390

Final Appeal focussed on four foci of enquiry; 'mechanical efficiency', 'litigant contentment', 'lawyer satisfaction' and 'social function.'[13] Litigant contentment and lawyer satisfaction are beyond the scope of this study however 'mechanical efficiency' is addressed in Chapter 3 and 'social function' is addressed by examining the court's institutional relationships. 'Mechanical efficiency' in *Final Appeal* sought to identify the 'wrinkles and anachronisms in the judicial process' and suggest improvements.[14] The efficiency question in this study is still concerned with judicial process and asks whether, in the transitional period, the Supreme Court became a more efficient institution in dispensing justice. 'Efficiency' was measured, in this study, through the expeditious hearing, writing and delivery of judgments as these factors have a direct bearing on the volume of cases that the court can hear and provide guidance on each year.[15] This in turn, impacts upon wider issues such as refreshing the system of precedent, the continuing development of the common law and the regularity of communication with the other institutions examined in this study. In other words the 'efficiency' of the court affects what *Final Appeal* termed the 'social function' that the court performs. *'Social Function*' was regarded in *Final Appeal* as an accumulation of the other three categories and described as 'the relationship of the House of Lords to other legal institutions'.[16] This relational theme clearly overlaps with the current study. Nevertheless, the design of this study reflects the wide-ranging programme of constitutional reform that has taken place since the publication of *Final Appeal* and the impact those reforms have had on the institutional relationships of the final appeal court. For instance, in *Final Appeal* there was no cause to examine the relationship with the CJEU or the ECtHR. Furthermore, *Final Appeal's* conclusions were 'medicinal' rather than 'surgical' in character, reflecting a more evolutionary constitution at that time.[17] In summary, *Final Appeal* was written in a different constitutional setting and with a different aim to the current study. Nevertheless, the empirical processes underpinning the work have clear parallels with the current study and the findings, where relevant, will be referenced throughout to provide empirical context to the results in the current study.

Alan Paterson's 1970s study, *The Law Lords* was another major empirical study on the Appellate Committee based upon qualitative rather than quantitative data. Paterson focussed on the processes behind decision-making in the Appellate Committee. Paterson was keen to explore the

[13]Blom-Cooper and Drewry, *Final Appeal*, n1, p4
[14]Blom-Cooper and Drewry, *Final Appeal*, n1, p4
[15]A complete picture of the efficiency of the court would require an examination of decision-making in the Appeal Committee as well as the financial efficiency of the court.
[16]Blom-Cooper and Drewry, *Final Appeal*, n1, p4
[17]Blom-Cooper and Drewry, *Final Appeal* n1, p397. For instance, it was suggested that the Appellate Committee changed its name to underline the separation between and to disassociate itself with class privilege and hereditary nature of the legislative chamber of the House of Lords. This is far removed from the changes that were eventually wrought by the CRA; See p406.

relationship between role and the perception of role[18] to the decision-making process, particularly in what he termed 'hard' cases.[19] He used a number of resources including the cases arising in the House of Lords between 1957 and 1973, interviews, judicial biographies, extra judicial writings, books and articles.[20] His primary resource was based on 'in-depth' interviews conducted with the Law Lords and counsel. Paterson also drew upon his own observations of the interaction between counsel and the Law Lords. The interviews followed a pre-prepared checklist of open-ended questions with an element of flexibility incorporated to respond to the interviewees' answers.[21] This method afforded him a 'behind the scenes' view of the internal discussions between the Law Lords and counsel and how those discussions influenced the decision-making processes in the Appellate Committee.[22]

In his recent book, *Final Judgment, The Last Law Lords and The Supreme Court*,[23] Paterson examined decision-making in the final appeal court as a social process, turning his focus to the underlying dialogues behind the court's decision-making. Dialogues – like role analysis - are influenced by and often respond to the *expectations* of the court.[24] Paterson primarily relied upon 'elite' interviews, however he also included some quantitative analysis and was able to take advantage of the availability of judicial notebooks as well as the Supreme Court broadcasts of courtroom dialogues.[25] Paterson's empirical study reviewed the 'dialogues' held between the final appeal court and each of the institutions explored in this thesis including with Parliament, the executive, the Court of Appeal, with Scotland and the overseas courts, although some of these institutions were covered more comprehensively than others. Paterson's findings on 'role' and 'dialogue' in decision-making clearly link with the quantitative results in this study and provide further context to the core theme of institutional relations and relationships and the role that the final appeal court has- or perceives itself as having- in each of these relationships. Paterson's findings will therefore be referenced throughout.

The Methodology of this Study

Time Period and Number of Appeals

[18]See also discussion in text at Chapter 1, n23
[19]Paterson, *The Law Lords,* n1, p3
[20]Paterson, *The Law Lords,* n1, p4
[21]Paterson, *The Law Lords,* n1, p5-6
[22]Paterson, *The Law Lords,* n1, p7
[23]Paterson, *Final Judgment,* n2
[24]Paterson, *Final Judgment,* n2, p3
[25]Paterson, *Final Judgment,* n2 p3-5

Final Appeal's time period ran from 1952-1968, covered 500 House of Lords decisions[26] and took 5 years to compile.[27] The authors also examined leave to appeal petitions heard in both the House of Lords and the Court of Appeal during the same time period. The time constraints of this doctorate and the fact that it was carried out by a single coder meant that leave to appeal applications were out-with the scope of this study and the data collected only covered the 4 year transitional period between the House of Lords and the Supreme Court. At the time of *Final Appeal*, the House of Lords heard an average of 33 appeals per year. The number of appeals heard by the court per annum has risen substantially since that time. As a result, this study still covered 246 decisions; just under half the number in *Final Appeal*.[28] The time period allowed a symmetrical picture to be obtained by reviewing the two years prior to the opening of the Supreme Court and the two years thereafter. The four year time period was also long enough to generate statistically significant patterns. Empirical study of the JCPC in the relevant years would have added a more complete picture to the empirical database, however for the same reasons provided in *Final Appeal*, namely space and time constraints, an empirical analysis of the JCPC appeals arising in the time period was omitted from this study.[29]

Final Appeal identified similar drawbacks to those in the current study, namely sample size, sample bias and whether or not something is a causal factor. The authors felt that the sample size of 17 years was a sufficiently long time to avoid sample bias and that a 'methodologically safe ground' could be achieved if they curtailed their findings to the time period studied.[30] The time period covered in this study is far less than that in *Final Appeal*, however the number of appeals covered is closer i.e. just under half. Larger sample sizes are preferable as the results from the sample are likely to be closer to the results of a study covering the whole population.[31] Given the smaller number of appeals and the shorter time period, this study avoids the issue of 'sampling error'[32] by limiting its findings to a description of the final appeal court's activities in the transitional period studied and makes no attempt to use the findings to empirically predict how the court may operate in the future.

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[26]The number of appeals was fairly consistent during this time at around 30 appeals a year; Blom-Cooper and Drewry, *Final Appeal,* n1, p241

[27]Blom-Cooper and Drewry, *Final Appeal,* n1, p5

[28]*Final Appeal* recommended an increase in the Appellate Committee's caseload to around 100 cases a year. This would increase subject expertise, avoid too much reformist zeal being attached to any case and avoid errant decisions being left unreversed for too long. The average number of cases each year in this study still fell short of this recommendation at 61.5 appeals; Blom-Cooper and Drewry, *Final Appeal,* n1, p399-400

[29]Blom-Cooper and Drewry, *Final Appeal*, n1, p103

[30]Blom-Cooper and Drewry, *Final Appeal*, n1, p8

[31]A Field, *Discovering Statistics using SPSS* (Sage, 2009) p35

[32]A Agresti and B Finlay describe this as '… the error that occurs when we use a statistic based on a sample to predict the value of the population parameter.' See *Statistical Methods for the Social Sciences* (Pearson, 2009), p18

The sampling method in this study is akin to random sampling in that it was entirely random which cases arose in the 4 years studied and no case was discriminated against, provided it arose in the sessions covered by the study. As such each case arising in the 4 year period had the same probability of being selected (100%) and each case not arising in the 4 year period had the same probability of not being selected (0%). Random sampling eliminates the issue of sample bias, however there is still a danger of under-coverage with a certain group lacking representation in the time period studied.[33] As will be seen later in the study, this was particularly true of appeals originating in Northern Ireland and appeals that responded to a CJEU reference.[34] Where bias is an issue through under-coverage or otherwise, the conclusions should be limited to the time period and avoid wider inference beyond the data collected.[35] Although this supresses, to a certain extent, the impact of the conclusions that can be drawn, *Final Appeal* acknowledged that these limitations are always present in sociological research and by limiting conclusions to those which may properly be drawn on the basis of the data, it should still '… illuminate rather than befog the mechanism of the judicial process.'[36]

Corroboration using Observational Data

The empirical study was very much the starting point for further analysis. It was therefore essential to corroborate the empirical data with evidence gathered from other sources. Corroboration allows flesh to be placed on the bare statistics and helps to explain why a particular pattern has developed, or provide possible reasons for surprising results. The empirical data was corroborated using the observational data collected from the judgments,[37] published judicial interviews, judicial lectures as well as relevant academic literature and empirical studies. In *Final Appeal*, the authors conceded that gathering points from judicial dicta across a wider variety of cases '… is impressionistic and not governed by hard and fast rules.'[38] The impressionistic nature of the observational data analysed in this study was compounded by the fact the study was conducted by a single coder. Calderone's caveat is consequently endorsed in this study; '… statistics … should be read not as hard-and-fast numbers but as broadly indicating my feel of the data.'[39]

[33]Agresti and Finlay, *Statistical Methods*, n32, p20
[34]Blom-Cooper and Drewry identified this issue with Scottish appeals; *Final Appeal*, n1, p8
[35]Agresti and Finlay, *Statistical Methods*, n32, p21
[36]Blom-Cooper and Drewry, *Final Appeal,* n1, p8
[37]Blom-Cooper and Drewry also collated 'points of interest' outside that required for the empirical study; *Final Appeal*, n1, p9
[38]Blom-Cooper and Drewry, *Final Appeal*, n1, p146
[39]R Calderone, 'Precedent in Operation: A comparison of the Judicial House of Lords and the US Supreme Court' [2004] PL 759, 778-779

SPSS

SPSS version 19 was used to input and analyse the data that was generated from the cases. The judgments were read, coded and the data inserted into SPSS. A set of research analysis questions[40] was compiled for each variable and discussed with a statistician at the University of York, who assisted with the generation of the statistical analysis in SPSS. The figures in the crosstabs generated were then manually crosschecked against the original SPSS database, to ensure accuracy and that the correct variables had been used for each research question.

Quantitative Empirical Analysis

The quantitative data used in this study is *descriptive* rather than *predictive*. The statistics *describe* the numeric frequency of a phenomenon as well as the spread of the data around a centre point i.e. the standard deviation from the mean and the standard error of the mean. Statistical significance tests were run on the data to gauge whether any difference in the data collected for the Appellate Committee and the Supreme Court was more than could be expected by chance. A mixture of discrete and continuous variables was used in the coding i.e. some variables had a discrete number of categories that the data could fall into and others simply recorded the number of instances along a continuous continuum. Whether a variable was continuous or categorical had an effect on how the data was displayed and the significance test used.

Mean, 5% Trimmed Mean and Median

The mean was the most common measure of the centre point of the data used, and was calculated by dividing the sum of the values recorded for a variable by the number of values recorded. The mean can be adversely affected by outliers. Occasionally the 5% trimmed mean figure was used in the analysis to disregard any outliers and provide a mean figure that was closer to the median. The median is the true midpoint in the data and is not affected by outliers or significant variance between the data.

Standard Deviation

The standard deviation measured the standard variance of the data from the mean. A low value indicated that there was a slight variation between cases from the mean. By contrast, where the data was widely dispersed there was a larger variation from the mean, indicating that the mean did

not actually represent the majority of cases.[41] A standard deviation figure of more than two or three times the value of the mean indicated a lot of variability around the mean.

Standard Error of Mean and 95% Confidence Intervals

The mean could vary between different sessions or years in the court, therefore the standard error of mean was used to determine the level of confidence that if the study was repeated with a different sample, it would deliver a similar mean value. The standard error of mean is calculated by dividing the standard deviation figure by the square root of the number of cases.

A 95% confidence interval for the mean was occasionally used. It provides a 'lower bound' and an 'upper bound' figure with 95 out of 100 cases falling between these figures. The wider the confidence interval, the less accurate the sample mean was.[42] Confidence intervals are therefore affected by sample size. The smaller the sample size, the larger the confidence intervals are likely to be as it is less easy to predict where future cases will fall. There were various instances, highlighted throughout this project, where the analysis proceeded with a degree of caution owing to the large confidence intervals returned.

Correlation and Covariance

Correlation looked at the relationship between two variables whereas covariance tested whether the deviation of one variable from the mean also caused the other variable to deviate from the mean, either in the same or the opposite way. The direction of travel indicated whether the two variables were positively or negatively related.[43]

Pearson Correlation Coefficient

Covariance can be affected by the scale of the measurement used. As such, it is standardised into the same type of measurement unit, known as the Pearson Correlation Coefficient, to allow a comparison to be made.[44] The Pearson value produced a figure that lay between -1 and 1, with a negative value indicating a negative relationship, a positive value indicating a positive relationship

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[40]See Annex III.
[41]Field, *Discovering Statistics,* n31, p39
[42]L Epstein and A Martin, *An Introduction to Empirical Legal Research* (OUP, 2014), p153-154
[43]Field, *Discovering Statistics*, n31, p167-168
[44]Field, *Discovering Statistics,* n31, p169-170

and 0 indicating no relationship between the two variables.[45] This figure was used in this study to gauge the relationship between two variables and can be identified as the 'r' value.

Significance Tests

Various significance tests were used to identify whether a difference between the courts or in the relationship between two variables was more than what would occur if left to chance. The test used depended on whether the data being compared was continuous or categorical and how many variables were being compared.

The 'p' value measured probability and operates on a 5% significance level i.e. for there to be a significant difference, the 'p' value had to be less than or equal to 0.05. In other words, there was less than a 5% chance of that pattern occurring by pure chance.[46] A non-significant difference in the data generated by the Appellate Committee compared to the Supreme Court did not mean that the move to the Supreme Court had no effect on that variable, but rather that the difference recorded could have occurred by chance. Significance tests were not just used to compare the data between the two courts. The data collected for all four years was occasionally analysed to create a larger sample size. The result from a four year period could be expressed with more confidence than with a two year period. For instance, the effect of executive involvement on average length of case was not something that necessarily had to be compared between courts and was measured across all 4 years to create a larger sample size and to determine with more certainty whether executive involvement had a significant effect on case length.

Where statically significant results were returned, occasionally post-hoc analyses- using the Bonferroni correction- were carried out in order to pinpoint in a more precise way where the statistically significant differences lay.

Independent sample t-tests were used to compare the differences in the mean for the continuous variables[47] between two groups i.e. the Supreme Court and the Appellate Committee. However, the independent t-test assumes the same heterogeneity of data in the two groups. Where there was a lot of variation between cases, for example, in terms of the number of citations that were made, the Levene's test for homogeneity of variance was used in order to test how significant the heterogeneity of the data was. Where there were found to be significant levels of heterogeneity,

[45] J McClave and T Sincich, *Statistics* (Pearson, 2013), p579
[46] Field, *Discovering Statistics*, n31, p50
[47] For instance, the number of ECtHR citations would be a continuous variable.

the Welch statistic was used instead as this takes into account heterogeneity of data and gives a more accurate picture of significance.

A one way analysis of variance (ANOVA), identifiable by an F statistic, was used to compare the difference in the mean of three or more groups, for instance between the four separate sessions. ANOVA has limitations and cannot reveal between which years the significant differences lie.[48]

The Chi squared test can be identified by the χ^2 symbol and was used to test the relationship between two independent categorical variables such as 'court' and 'finding against the executive'. It tested whether the frequencies in each category were different to the expected frequency if it were left to chance.[49] Categorical data records the frequency of each category for each court. As such, it requires a test that compares relative frequencies of the data rather than comparing means, as the latter cannot be calculated when the data is not continuous.[50]

Displaying the Data

The data is principally displayed using cross tabulations as it provides a clear visual of the differences between the Appellate Committee and the Supreme Court in respect of frequencies for categorical variables and in respect of the mean for continuous variables. Bar charts and pie charts were occasionally used to illustrate the frequency distribution for the categorical data or the number of observations for each category.[51]

A stem and leaf diagram was used to display the spread of continuous data for judgment length and judgment gap. The stem groups the data in units of ten and each leaf on the stem represents a case. The judgment gap stem, by way of example, grouped all the cases that had a judgment gap in the forties together, then the fifties, and so forth. The diagram assists in visually representing the spread of the data and where most cases clustered. A scatter plot was then used to provide a visual of the linear relationship that existed between the judgment gap and judgment length, being two continuous variables.

Variables and Coding

A standardised and systematic method of approaching each case was achieved by using the same variables with the same coding categories for each variable as displayed in Annex 2. The data

[48]Field, *Discovering Statistics,* n31, p349
[49]Field, *Discovering Statistics*, n31, p688
[50]Field, *Discovering Statistics,* n31 p688. See also Agresti and Finlay, *Statistical Methods,* n32, p31

collected from each of the 246 judgments was coded into SPSS across the 22 different variables.[52] The variable outline below reveals how each variable fed into the wider thesis. Occasionally, the circumstances in a case proved difficult to fit within a predetermined code. Any difficulties in the coding process, which could have affected the results generated from the variable, are accounted for below, together with the measures taken to counteract the difficulty.

Functional Variables

Name of Case

This categorical variable was used for identification purposes only and listed the case name and citation for all 246 judgments. Conjoined appeals were counted as one case, provided they shared the same citation. This was the approach taken by Shah and Poole[53] and by *Final Appeal*[54] however it is acknowledged that this is not always the approach of the official judicial statistics. The latter can therefore differ in the number of appeals recorded for a given session.

Court

This categorical variable recorded whether the case arose in the Appellate Committee or Supreme Court. The variable had a purely functional purpose to allow the substantive statistics to be compared and analysed, depending on which court the case arose. The case was attributed to the court in the citation. In the transition between the courts, a case was occasionally heard in the Appellate Committee, with final judgment being delivered in the Supreme Court. This was coded as a Supreme Court case as it was published as a Supreme Court judgment and that court took ownership of it. This may artificially increase the Supreme Court case numbers, however as the majority of the variables are 'judgment' rather than 'hearing' focussed the process of the judgment writing was

[51]Agresti and Findlay, *Discovering Statistics*, n32, p32
[52]Blom- Cooper and Drewry asked 60 questions of each appeal; *Final Appeal*, n1, p9
[53]Shah and Poole, 'The Impact of the Human Rights Act', n2, 361-362
[54]Blom-Cooper and Drewry, *Final Appeal*, n1, p39

likely to have taken place after the close of the Appellate Committee.[55] Ten cases were affected by this, amounting to just 4% of the judgments.[56]

Court Session

This categorical variable was used to compare the substantive statistics between each session. Sessional differences could suggest that other factors had an impact on the results generated, aside from the changeover between courts. External factors, which may affect the operation of the court, include personnel differences such as the retirement, appointment or absence from court of a particular judge, a particularly problematic piece of legislation leading to several cases or a change in court budgets or procedure. Session differences could also reflect annual fluctuations in caseload, including an unusually large number of a particular category of case or a large number of appeals from a particular lower court. The sessional distinction allowed these factors to be accounted for at the analysis stage.

Subject matter and Category of Case

Each case was coded as one of 79 different subject matters. If there were several subject matters identified in the case, a decision was taken as to the main and secondary subject matters. Each individual subject matter then fed into 4 umbrella categories; (i) Human Rights (ii) Domestic Constitutional, Administrative or Public Law ('DCAPL') (iii) Private Party/ Law of Obligations or (vi) International (other than Human Rights) and were analysed according to the umbrella categories to ensure large enough numbers were present for meaningful analysis.

The main points under appeal were discerned primarily from the facts and legal issues outlined in the judgment, with the Westlaw case categorisations being used as a secondary reference point to see how another resource, albeit equally subjective, had classified the appeal. As a result, this study occasionally departed from the Westlaw classification. The classification of each issue into a subject matter is a subjective process and is complicated further by a lack of clarity and/or consistency between judges on the certified points of appeal. The correct classification of appeals is not an issue

[55]These cases tended to be heard in late June or July immediately prior to the summer recess suggesting that judgment writing took place over summer or immediately after the Supreme Court opened its doors. Paterson found that Law Lord's would 'constantly' discuss the issues informally during the course of an appeal. The first formal conference took place as soon as the hearing ended where judges presented a series of 'monologues' outlining their initial views before judgment writing was apportioned. This was followed by an, on average, six week drafting period after which opinions where circulated and perhaps reduced in number; Paterson, *The Law Lords,* n1, p89-97.

[56]*R v Horncastle* [2009] UKSC 14 was one of the ten and was a key case in the study period that departed from the ECtHR line. This will be accounted for at analysis stage.

exclusive to this study. The official judicial statistics' can be overly generic and inconsistent in their classifications each year.[57] Shah and Poole felt that their method may have led, '… to an over-counting of 'human rights' cases and thus to a possible over-accentuation of the importance of human rights.'[58] *Final Appeal* referred to the 'formidable problem of classification' given that 'any subject- classification [they] construct is essentially arbitrary and the assignment of marginal cases to particular categories is often extremely difficult.'[59] *Final Appeal* used 36 different categories and a miscellaneous category which was then condensed into a shorter list of 16 categories.[60] The authors did, however, admit that the final list was a product of personal preference and they caveated the validity of this aspect of the work depending upon how the data was to be utilised.[61] As such any conclusions drawn on subject-matter have to be mindful of these limitations.

The value of looking at all subject areas is that it provides a complete and systematic picture of what the court was doing over a certain period of time without selecting those cases that appear to take a more interesting analytical line. The suggestion that 'rights' based discourse transports the judges into the political decision-making arena, where they are required to make value judgments,[62] has led to past studies of the courts using the 'rights' filter to focus their enquiry.[63] In this study, all cases were fed into SPSS to provide a complete picture of the patterns emerging from the final appeal court in the time period. Nevertheless, the deeper analysis tends to centre on those cases arising in the human rights or wider public law field. This was partly because private law matters fall out-with the author's area of expertise and also because, contrary to the empirical database's equality of treatment between cases, not all cases were of equal legal and constitutional 'significance.'[64] Private law matters seldom provided much insight into the developing legal or political institutional relations of the final appeal court.

The frequency of certain subject categories provided evidence of the type of court that the Supreme Court is becoming. Past studies have suggested that the Appellate Committee was becoming a more

[57]B Dickson, 'The Lords of Appeal and their Work', n1, p147
[58]Shah and Poole, 'The impact of the Human Rights Act on the House of Lords', n2, p356
[59]Blom-Cooper and Drewry, *Final Appeal*, n1, p244
[60]Blom-Cooper and Drewry, *Final Appeal*, n1, p244
[61]Blom-Cooper and Drewry, *Final Appeal,* n1, p244
[62]Laws LJ, 'The Common Law and Europe' (Hamlyn lecture, 27 November 2013) para 23 <www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/laws-lj-speech-hamlyn-lecture-2013.pdf> accessed 30 December 2015. See also J McGarry, The Principle of Parliamentary Sovereignty (2012) 32(4) LS 577, 596
[63]Dickson, *Human Rights and the United Kingdom Supreme Court*, n1. Shah and Poole, 'The Impact of the Human Rights Act on the House of Lords' and Shah and Poole, 'The Law Lords and Human Rights', n2
[64]Shah and Poole highlight *A v UK* [2004] UKHL 56 (*Belmarsh*) as an example of a constitutionally significant decision; 'The Impact of the Human Rights Act', n2, 352

specialist public law court and moving away from the generalist traditions of the past.[65] A more specialist function would have some advantages such as reducing the irregularity of certain subject matters, increasing expertise in those areas and regularly updating and renewing precedent within that specialist area.

Administrative Efficiency Variables

Length of Case

This continuous variable measured any change to the average length of time taken to hear a case in the transition to the Supreme Court. An efficient court which deals with cases in a timely manner will minimise the risk of attracting future criticism on the basis of delay.[66] Nevertheless, a more efficient court may be achieved at the expense of another desirable facet. Decision-making in cases in the Appellate Committee depended largely upon oral argument and there was a degree of expectation that the judges curtail their consideration of legal issues to those raised by counsel.[67] Furthermore the hearing time must allow for a process of interruption and 'interrogation' of counsel's arguments which are motivated by a need,'… to test counsel's propositions, to sound out counsel's view on particular points, to obtain clarification of counsel's argument and to persuade fellow Law Lords.'[68]

Justice must be delivered in an expeditious manner however the final appeal court must also sound out the issues, comprehensively review the relevant authorities and produce an informative and well-reasoned judgment that appreciates the wider social context of the issues at hand. The hearing time reflects the need for full and tested argument on each issue in order to meet the legal and constitutional role of the court. The average length of case provides an insight into the balance being struck by each court between efficiency and satisfying such demands.

Judgment Gap

[65]Shah and Poole found a 'more pronounced public law profile' following the enactment of the HRA with an increase of 20% in the number of rights-related appeals being granted leave; 'The Impact of the Human Rights Act', n2, 361. Paterson also notes the 'dramatic increase' in public law and human rights cases and the corresponding decline in tax, criminal and shipping cases; *Final Judgment*, n2, p17

[66]The Appellate Committee received criticism for having a large back-log of cases prior to the implementation of the Appellate Jurisdiction Act 1876, which detracted from the efficient administration of justice; J Vallance White, 'The Judicial Office' in Blom-Cooper, Dickson and Drewry (eds) *The Judicial House of Lords 1876-2009* (OUP, 2009), p31

[67]Paterson, *The Law Lords*, n2, p36-38. Although the Law Lords were not in agreement on the weight of this expectation.

[68]Paterson, *The Law Lords*, n2, p66 and 72

This continuous variable measured the difference between the Appellate Committee and the Supreme Court in terms of the average number of days taken to hand down judgment after the hearing. The results fed into the analysis on the overall efficiency of the court by asking whether the court is able to provide guidance to the other institutions in an expeditious manner. A similar balance must be struck between the need to deliver the judgment as soon as possible after the hearing and the need to deliver carefully crafted judgments, of the highest quality, that provide clear direction to the public and the lower courts.

The judgment gap mean was affected by recesses in the court. The mean included recesses to provide a measure of the average time it took, in real terms, to receive a judgment.

Length of judgment

This continuous variable measured the average length of judgment and was part of the analysis on the efficiency of the court. A clearly reasoned judgment which the public can comprehend is part of due process and the rule of law.[69] As such, a delicate balance has to be struck between aiding accessibility without compromising the substance of the judgment. Judgments can, however, be repetitious on several fronts. Each judge may repeat the facts, the relevant statutory provisions or the key points from the authorities when delivering their judgment. Concurring opinions will also further increase the danger of unnecessary repetition in the case. Since the close of this study there has been a call from the current President of the Supreme Court for judges to reduce the length of their judgments and to curb the number of opinions issued.[70] This variable measured the extent to which this call was prompted by lengthy judgments in the time period and established the empirical link between judgment length and other factors such as judgment gap, the number of Justices on the panel, the number of concurrences and dissents and the subject matter of the appeal.

Panel Size

This categorical variable measured the frequency of each size of judicial panel. The Supreme Court more routinely convened larger panels than the Appellate Committee. This variable sought to measure the extent of that increase and to confirm the circumstances where a larger panel tended

[69]Lord Neuberger, 'No Judgment- No Justice' (First Annual Bailli Lecture, 20 November 2012), para 11-13<www.supremecourt.uk/docs/speech-121120.pdf>last accessed 22 February 2016
[70]Neuberger, 'No Judgment-No Justice', n69

to be convened.[71] The implications of convening a larger panel were also reviewed, including unanimity levels in larger panels, the effect of convening a larger panel on the efficiency of the court and the consequent effect on the court's institutional relationships. For instance, if the case originated in Scotland, a larger judicial panel- without the addition of temporary Scottish judges- would dilute the weighting of the Scottish judicial vote even further.

Single judgments

This categorical variable established whether single judgments were becoming more frequent in the Supreme Court in the time period. The Appellate Committee was constrained by the need for the Law Lords to each provide an individual opinion; however, it is now open to the Supreme Court to issue a single collective judgment, as is common in other appellate courts. The discerning use of a single judgment could increase legal certainty and the new court's authority through speaking more often as a collective. Nevertheless, single judgments may compromise content and as such the data from this variable was reviewed alongside the data collected on citation levels.

It should be noted that academic and international comparative citations were recorded in the empirical data, however are not specifically analysed in this thesis. Where relevant, the results from these variables were included to support the analysis on the substantive variables reviewed. As such, the relationship between single judgments and the volume of academic and international citations was reviewed as part of the analysis on the content of single judgments.

Concurring Opinions

This categorical variable established whether the practice of providing a concurring opinion reduced in the Supreme Court. A judge 'concurred' when that judge provided any additional words above and beyond the standard formal concurrence wording, namely,

> I have had the advantage of reading in draft the opinion of my noble and learned friend (judge x) for the reasons he/she gives, with which I entirely agree, I too would allow/dismiss the appeal and make the order proposed.

[71]Lord Hope suggested that a larger panel will be convened 'if the court is being asked to depart from a previous decision, or there is a possibility of it doing so, or if the case raises significant constitutional issues or for other reasons of great public importance.'; 'The Creation of a Supreme Court was it worth it?' (Gresham College Lecture, 24 June 2010) < https://www.supremecourt.uk/docs/speech_100624.pdf> accessed 18th September 2015

This methodology occasionally resulted in a single paragraph that went beyond the standard wording being coded as a 'concurring opinion'. This was necessary in order to avoid any arbitrary lines being drawn in terms of what constituted a concurring opinion. To be a concurring opinion, the enhanced paragraph had to contribute some substantive reasoning to the appeal or associate/disassociate itself with a particular aspect of another judge's opinion. If neither were present then it was coded as a formal concurrence.[72]

It is acknowledged that this may artificially inflate the number of substantive concurring opinions, however this methodology is broadly in accordance with what Shah and Poole label the 'Harvard Rules' that govern the Harvard Law Review's statistics on concurrence and dissents;

> (a) a concurrence or dissent is recorded as a 'written opinion' whenever a reason, however brief, is given; (b) a Justice is considered to have dissented when he or she voted to dispose of the case in any manner different from that of the majority of the court; (c) plurality opinions that announce the judgment of the court are counted as 'opinions of the court'; (d) opinions concurring in part and dissenting in part are counted as dissents.[73]

The empirical database took a slightly different route in scenario (d). Multiple issues can lead to a concurrence on one issue and dissent on another. In such an instance the database was sophisticated enough to record the position on different issues and so the judge was recorded as having provided both a concurring and a dissenting opinion in the case.

Two judges were occasionally considered to share the lead judgment. This occurred where those judges provided a joint lead opinion or in conjoined appeals where different judges took the lead on the separate appeals or where different judges took the lead on separate issues. In such a scenario, the other judges tended to concur with both opinions in their judgments. The presence of a second lead judgment had the effect of reducing the overall number of concurring opinions for that case and the overall average for the court. However, this only occurred on 9 occasions in the Appellate Committee and 7 in the Supreme Court and as such had an almost equal effect on each court.

Dissenting Opinions

[72]See Lord Clarke's formal concurrence in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 [163]; 'I agree that this appeal should be dismissed for the reasons given by the other members of the court. Both Lord Mance and Lord Collins have analysed the relevant principle so fully and so expertly that it would be inappropriate self-indulgence for me to attempt a detailed analysis of my own.' Technically, this is an 'enhanced paragraph', however as Lord Clarke provided no substantive legal reasoning of his own and did not align himself with any other opinion, it was regarded as a formal concurrence.

This categorical variable examined the volume of dissenting opinions in each court. A dissenting opinion was recorded if a judge disagreed with the majority of the court on the outcome of at least one issue, however it was not recorded where a judge concurred as to outcome but dissented as to reasoning. The study explored the relationship between dissent and variables such as subject matter and panel size to gain a perspective on how dissent was accommodated in the new court and to build upon other quantitative studies in the area, such as Shah and Poole's findings in human rights and rights-related judgments.[74] A lower dissent rate in larger judicial panels, for instance, may indicate a decision taken by the Supreme Court to employ extra judicial resource and deliver a collective decision to increase the weight behind the decision.

Dissent has its supporters in a common law system, where the heritage of the common law and each Law Lord providing their opinion in the Appellate Committee encouraged independence of thought and as a consequence dissent.[75] Alder advocates an institutional focus on *certainty of outcome* rather than *certainty in the law*, as he believes dissent reflects and accommodates legitimate disagreement in values in a democracy.[76] This is in stark contrast to those who believe certainty and efficiency would be enhanced by a reduction in dissent[77] and would bring the court in line with the practice of other top courts. This study contributes to this debate by demonstrating empirically the effect of dissent in the time period.

Split Votes

This categorical variable examined the most common way a judgment is carried. Arguably a close split such as a 3:2 spilt is harder to justify than a 4:1 split as it demonstrates that there is strong judicial support for two different ways of applying the law to the issues. The danger of convening a larger panel is the occurrence of a 5:4 split, which is as close as the Supreme Court could be to having a completely divided court. Close splits become even more controversial where the court is overturning a unanimous lower court, departing from precedent or departing from an established line of ECtHR authority. The authority of the court in these types of cases is reduced to perhaps as little as three judges on the case.

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[73]Shah and Poole, 'The Law Lords and Human Rights', n2, 84

[74]Shah and Poole, 'The Law Lords and Human Rights', n2, 87. The authors found that additional 'noise levels' came from concurring rather than dissenting opinions and that the dissent rate in fact decreased in human rights and rights-related cases.

[75]J Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20(2) OJLS 221; Paterson, *The Law Lords*, n1, p100-101; Lord Kerr, 'Dissenting Judgments, self indulgence or self sacrifice?' (Birkenhead Lecture, 8 October 2012) < https://www.supremecourt.uk/docs/speech-121008.pdf> accessed 29 September 2015.

[76]J Alder, Dissents in Courts of Last Resort, n75, p226

The decision splits for each issue were recorded for each appeal. Occasionally, a judge's position on each issue could not be recorded as (s)he would decide an issue one way, which would render the other issue redundant. For instance, Lord Rodger only answered two of the three issues in *R (on the application of Al-Jedda) (FC) v Secretary of State for Defence*[78] because the first issue knocked out the second. If all the judges agreed that one or more of the issues need not be determined, then they were not coded as an issue under appeal. Nevertheless, if at least one judge felt that the issue needed determined, it was counted as an issue under appeal.

Relations with Other Branches of State Variables

Finding for or against the Executive

This categorical variable measured how often the Supreme Court and the Appellate Committee handled cases involving the core executive and secondly how often they found against the executive in the time period. The study was interested in the relationship between 'core' executive function and the final appeal court, in particular the rate at which core Government policy was found to contravene the law. The final appeal court has a difficult political and legal balance to maintain in its relations with the executive. Legally, it is required to judicially review executive action to ensure that it is legal. Nevertheless, a court which is frequently seen to find against the executive runs the political risk of being accused of acting against the democratic will of the electorate and having too much unaccountable power.[79] This variable provided an empirical illustration of where the balance lay in the transitional period.

Executive involvement has the potential to be quite wide, especially if 'local government' actions are included within the definition. For the purposes of this study, 'executive involvement' was defined as appeals that had a governmental department as a party. As such, all ministerial departments were coded as the executive and some non-ministerial departments were included such as HM Revenue and Customs[80] and the Rent Office.[81] Appeals involving the Security Services[82] were also classed as

[77]Blom-Cooper and Drewry, *Final Appeal*, n1, p89 and Shah and Poole, 'The Law Lords and Human Rights', n2, p91

[78][2007] UKHL 58

[79]See the launch of the Judicial Power Project at Policy Exchange on 20 October 2015 which 'aims to understand and correct the undue rise in judicial power … '. <www.judicialpowerproject.ork.uk/about>

[80]Blom-Cooper and Drewry classified the Inland Revenue as the executive and it was stated to be one of the main areas where the individual would 'confront' the executive; *Final Appeal*, n1, p141

[81]*R (on the application of Heffernan (FC)) v The Rent Service* [2008] UKHL 58; the Rent Office is an executive agency of the Department of Work and Pensions established to carry out a practical act in assessing benefit levels.

[82]*R (on the application of A) v B* [2009] UKSC 12; *Al Rawi v The Security Service* [2011] UKSC 34

the executive.[83] There were exceptional cases that were also coded as involving the executive, where the named parties to the appeal did not involve a governmental department, however a government department then intervened and supported the arguments of a party to the appeal and the court treated their arguments as one.[84] Another exceptional case was where a Health Authority took the action challenged in the case, in lieu of the Secretary of State, pursuant to the Secretary of State's powers under s30 of the Registered Homes Act 1984.[85] Local authority cases were not included as they focussed on micro rather than macro policy such as resource decisions pertaining to the care, housing or social security of specific individuals. In a similar vein cases taken against a specific police force were akin to local government actions and not coded as involving the executive.[86] The CPS was not classed as the 'executive' as any successful criminal prosecutions had the potential to artificially inflate the results on executive success. Furthermore, in extradition cases, the executives of foreign countries were not coded as involving the 'executive' as the variable only related to the UK executive.

Relations with Lower Courts variables

Originating Court

This categorical variable recorded the origin of appeals and whether the proportion of appeals from a particular lower court changed in the time period. The variable's function was to measure which lower court, on average, raised more 'points of general public importance' to be determined by the final appeal court and thus which lower court had the most interaction with the final appeal court. It also had a procedural function to distinguish between lower court origination in the analysis of the other variables.

Conjoined appeals affected the coding for this variable as well as the 'overturn' and in some instances 'finding against the executive' variables. Such appeals could have two different originating courts as well as two different outcomes. Furthermore, one case may involve the executive when the other did not. In these circumstances no value was coded for the variable and so the cross tabulations in these variables do not total 246 cases to reflect the missing data. The database was

[83] Guidance was taken from Laws LJ's statements in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 [85-86] where he declared that 'the first duty of Government is the defence of the realm' and this did not solely amount to, '… tanks on the wrong lawns.' It is therefore clear that the judges regard Security Services as an important part of the executive's defence role.
[84] *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74.
[85] *Trent Strategic Health Authority v Jain* [2009] UKHL 4

nevertheless sensitive enough to record the judicial voting on each issue, be it a conjoined or single appeal and the dissent rates on each.

Lower court; overrule, unanimity and precedent

These categorical variables each interrelated and taken together measured the rate of overturn of each lower court in the time period and whether the overruled lower court was unanimous and/or following precedent.

The rate of overrule of the lower courts provided a measure of the stability of the law in the time period. Furthermore, a high rate of overrule of a particular lower court, such as the High Court of Justiciary, may be even more acutely sensitive,[87] given the historical absence of Scottish criminal appeals to the Appellate Committee together with the minority Scottish representation on Supreme Court panels.[88] Thus, a stable legal system which promotes strong relations between the courts should seek to minimise overrule where possible.

Clearly there will be times when a divergence of views is unavoidable particularly in especially acute cases, where the lower court is constrained by precedent or where the final appeal court has a role to play in overseeing the development of the law beyond the particulars of the case. Nevertheless, if the system of precedent is working correctly, it should enhance the certainty and stability of the law, provide clear communication of the legal position to the lower court and keep overrule to a minimum. Should the data reveal that the Justices regularly interpret the law differently to the lower courts, then further study would be required to uncover the reason for this.[89]

The position of the lower court judges was taken from the lower court judgment. Occasionally, the official transcript of the lower court decision was not available. As such, the Westlaw case digest was used to gauge the result in the lower court without the support of the official transcript. The database only recorded whether the lower court was divided on at least one issue and did not

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[86] *R (on the application of GC) v The Commissioner of the Police of the Metropolis* [2011] UKSC 21 was an exceptional case that was taken against the top of the police chain of command. The Secretary of State intervened and made arguments synonymous with that of the police. The case was therefore coded as an executive case.

[87] Alex Salmond accused the Supreme Court of 'intervening aggressively' in the Scottish legal system following the Cadder decision. See S Carrell 'Salmond provokes fury with attack on Supreme Court' published on 1st June <http://www.guardian.co.uk/uk/2011/jun/01/alex-salmond-scotland-supreme-court?CMP=twt_fd>

[88] By convention only 2 Scottish Justices will sit on Scottish cases in the Supreme Court, compared to 3 or more judges who will have sat on the case in the High Court of Justiciary.

[89] Possible explanations include (i) statutory ambiguities (ii) a large number of cases where the issues are very finely balanced, (ii) the judges were asked to depart from established precedent set by either the Court of Appeal or by the Appellate Committee or (iii) the Justices are being asked to look at a new or old issue following the enactment of the HRA.

measure unanimity and dissent rates in relation to each issue. This is a drawback of the database in that it could indicate that a divided lower court was overruled when the lower court was actually unanimous on the issue before the Supreme Court.[90] The resultant effect is that rate of overrule of unanimous decisions could actually be higher than suggested in the thesis. Without reading every lower court judgment in full it would not have been possible to gauge the level of unanimity on each issue raised in each lower court decision, as was carried out for the final appeal court judgments. Furthermore, the limitation had minimal impact as it only affected 'divided' decisions and the vast majority of lower court decisions were unanimous.

The lower court 'unanimity' categorical variable complemented the 'overrule' variable by establishing whether overrule occurred more frequently when the lower court was divided. It is more controversial for the judges to overturn a unanimous lower bench as it demonstrates that two senior judicial panels would interpret the law differently. This has the potential to aggrieve litigants further, reduce overall certainty in the law and create disharmony in relations between the two courts.[91]

The 'lower court following precedent' categorical variable also complemented the 'overrule' variable by establishing how often the final appeal court overruled the lower court where the lower court believed that it was following established precedent. Again, a regular overrule of a lower court following precedent would suggest that the system of precedent is not providing effective guidance to the lower courts. The method used in order to determine whether House of Lords[92] or Court of Appeal precedent was followed by the lower courts was impressionistic. The final appeal court's summary of the lower court judgment and the Westlaw case analysis for each lower court decision was the starting point. A case was coded as 'not following precedent' where either no judgment was mentioned as being 'followed' or 'applied,' there was confusion among the judges over which line of cases should be followed, a case was followed that Westlaw regarded as having 'negative' or 'mixed or mildly negative' judicial treatment or where a court of first instance was cited in support of the lower court's findings. When the position was unclear using this primary method, then the lower court transcript was reviewed to determine whether the judges appeared to be following precedent.

[90]See e.g. *Scottish Widows Plc v Commissioners for HM Revenue and Customs* [2011] UKSC 32. The Court of Session was coded as being divided, however the judges were unanimous on the issue which the Supreme Court decided was the sole issue required to determine the case.

[91]Although Paterson felt that a divided final appeal court would offset these issues and be of 'comfort to judges in the lower courts who are being reversed and to losing litigants.' Paterson, *The Law Lords*, n1, p100

[92]Read Supreme Court, High Court of Justiciary or Privy Council precedent. Where an overseas JCPC case was 'applied' by the lower courts it was not coded as following established precedent as the case is not binding in this jurisdiction. However, when the High Court of Justiciary applied JCPC authority it was coded as following House of Lords precedent, as the JCPC was the highest court in relation to devolution issues prior to the CRA.

If the lower court felt that it was following both a House of Lords authority and a Court of Appeal authority it was coded as a 'House of Lords' precedent, being the higher of the two courts. Where it was only Court of Appeal judgments which the lower court was listed as following, it was coded as a 'Court of Appeal' precedent being followed. One final process undertaken was to establish whether the precedent followed by the lower court related to the point under appeal. This method attempted to create a standardised system in order to illustrate whether the lower court was attempting to follow an established line of authority.

There are several issues with the 'following precedent' method. Firstly, it is possible that the Court of Appeal authority relied upon was itself based upon a House of Lords authority. However, if the lower court did not explicitly mention the House of Lords authority and instead felt bound to follow the Court of Appeal authority, then it was coded as following lower court precedent. Furthermore, in cases where there were several issues, with precedent being followed on one issue but not on another, it was coded as following established precedent as there was at least one issue before the final appeal court where the lower court believed that it was following precedent. Thus the final appeal court could overturn the lower court primarily on an issue that was not the issue on which the lower court was following precedent. On the face of it, the database records an overturn of the lower court that followed precedent, however the final appeal court could have substantially agreed with the Court of Appeal on the point in which it followed precedent.[93] Again, without reading each lower court judgment, the database was not sophisticated enough to cater for such instances. The analysis therefore accounts for a potential over-counting of overturn of precedent.

There will also be cases where the lower court followed the correct precedent but then *interpreted* or *applied* that precedent wrongly so that it resulted in an overturn. Such an instance would be coded as an overturn of the 'lower court following established precedent'. Nevertheless, what is being measured is not the rate of 'overturn of precedent' but rather the rate of 'overturn of the lower court's decision in relation to that precedent'. Thus overrule includes the final appeal court correcting the *interpretation or application* of the precedent where the lower court was mistaken. Whether it is the 'precedent followed' that is being overturned or the correction of the *interpretation* of that precedent, it still results in the law being interpreted in a different way by the final appeal court and does little to upset the thesis surrounding these variables. In a similar vein, the lower court could apply the precedent incorrectly and yet reach the correct conclusion. In this instance the coding database would indicate that the lower court had followed precedent and that the Supreme Court affirmed the decision. The correct picture was that the lower court incorrectly

[93]See e.g. *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38

interpreted the precedent but reached the correct result.[94] Again, this was a drawback of the database.

In conjoined appeals, if the judgments both followed Court of Appeal authority or both followed House of Lords authority, then they were coded as such. However if there was a difference in terms of whether the respective lower courts followed precedent or the level of the precedent followed, then no figure was entered for the appeal as the statistical database could not cater for such information.

With these limitations in mind, the empirical data could only provide, at best, an indication of the relationship between precedent and overrule. The analysis concedes these drawbacks and offers a starting point to assessing the effectiveness of the precedent communication channels between the two courts.

Domestic citations

This continuous variable measured the volume of citations from a case originating in a different UK jurisdiction. The final appeal court acts as a UK court and unites all four nations by providing a legal service which could not necessarily be obtained, were the final of appeal to be geographically located within each separate jurisdiction. Nevertheless, the court has a sensitive legal and political balance to maintain between respecting the distinctive character of each legal system whilst at the same time providing an element of comparative value to the case. In order to obtain that value, the thesis quantitatively measured the extent that the judges utilised their knowledge of comparable cases in other domestic jurisdictions so as to enhance the quality of the judgment eventually received by each nation state.

Scottish appeals recorded English and Welsh and Northern Irish case citations whereas English and Welsh appeals recorded the volume of Scottish and Northern Irish citations. One unusual case arose in the time period that conjoined a Northern Irish Court of Appeal and an England and Wales Court of Appeal decision.[95] In that instance, the only 'comparative' authorities recorded were Scottish.

Relationship with the European Courts Variables

Relationship with ECtHR

[94] See e.g. *Multi-link Leisure Developments Limited v North Lanarkshire Council* [2010] UKSC 47

[95] *R (on the application of Adams) v Secretary of State for Justice In the Matter of an Application by Eamonn MacDermott for Judicial Review (Northern Ireland)* [2011] UKSC 18

ECtHR citations

This continuous variable measured the number of ECtHR authorities cited in each case, and provided the empirical foundations to assess the scale of jurisprudential review that the final appeal court undertook in its s2 HRA duty to 'take into account' the jurisprudence of the ECtHR. The results fed into the relationship with the ECtHR chapter, with its specific focus on s2 HRA, and also into the literature debating the level of obligation that s2 HRA demands. A court that is engaging with the ECtHR's jurisprudence in a meaningful and sustained manner is able to demonstrate outward engagement and a preparedness to enrich human rights protection for UK citizens under the HRA by drawing on cases with similar facts raised in other European countries.

A high level of ECtHR citations also demonstrates the role that a second tier of appeal plays for each separate legal system. The lesser caseload of the top court removes the time-constraints faced by the lower courts and thus the level of research and enquiry into the jurisprudence of the ECtHR that the final appeal court is able to undertake should be extensive.

Is the decision in line with the ECtHR?

This categorical variable measured the instances where the final appeal court followed or departed from the line taken by the ECtHR. The results fed into the analysis on whether the court felt compelled to follow the ECtHR line or whether it was able to distinguish the UK's unique domestic situation, where appropriate. The thesis used the data to conclude on whether the Supreme Court departed from the ECtHR line more frequently than the Appellate Committee and whether the court became more confident in safeguarding rights in a uniquely British manner and creating a distinct domestic jurisprudence under the HRA. The thesis also examined how clarity, or otherwise, in the ECtHR line of authority affected the administrative efficiency and institutional relations of the court.

The judges cited ECtHR authorities even in cases where an article of the Convention was not under consideration. In such instances, the variable still recorded whether the judges approved of the line taken by the ECtHR, as the judges still had a legal obligation under s2 and s6 HRA to take into account the case law of the ECtHR and to act compatibly with Convention rights.

Relationship with CJEU

CJEU Reference

The thesis examines the court's relationship with the CJEU through the narrow lens of the reference procedure and the incorporation of CJEU jurisprudence into judgments. This categorical variable measured how often the final appeal court sought guidance from the CJEU via the reference procedure and whether the frequency of references changed following the transition from the Appellate Committee to the Supreme Court.

The Supreme Court has a different relationship with the CJEU compared to its relationship with the ECtHR. There is reduced scope for dialogue[96] and the Supreme Court must accept the CJEU's interpretation of the EU treaties. Nevertheless, the court's use of the reference procedure is important, as it needs be able to recognise where there is uncertainty in interpreting the EU treaties and seek guidance from the CJEU. The CJEU also needs to have confidence that the Supreme Court is capable of fulfilling this role.

CJEU citations

The data generated from this continuous variable indicated the court's level of engagement with CJEU case law. This fed into larger questions such as whether the more linear relationship between the CJEU and the final appeal court, alongside the more civilian style of judgment of the CJEU, resulted in fewer CJEU authorities being cited.

Conjoined cases appearing before the CJEU had one citation number for both cases and from a coding perspective were counted as one case.

[96] Dialogue is the term used by academics to refer to the reciprocity of communication between the court and other institutions, in particular the ECtHR.

Chapter 3; Administrative Efficiency of the Court

For the court to command the respect of other constitutional actors, it must function effectively as an institution. The court needs to be in a position to regularly and efficiently communicate with the other institutions; otherwise it will not be able to operate effectively as a hub between sub-national, national and international judicial and governmental bodies. In practical terms, this means effective management of its caseload and ensuring that the judges produce comprehensive and accessible judgments. Effective institutional communication is a thread that runs through each of the relationships discussed and is principally measured in this study through the judgment produced.[1] Comprehensive, accessible and regular judgments will ease institutional interpretation and minimise error. This chapter therefore contextualises the substantive work of the thesis by reviewing the mechanical efficiency of the Appellate Committee and the Supreme Court.

Across the time period the Appellate Committee heard 129 appeals, with the Supreme Court hearing 117. A difference of 12 appeals, over a time period of only 2 years, was not large enough to suggest a general reduction in caseload in the Supreme Court or to provide strong evidence of a less efficient Supreme Court during its fledgling years. Appeal petitions were marginally lower in the first three years of the Supreme Court and averaged at 204 per year, compared to an average of 220 in the Appellate Committee between 1999 and 2009.[2] The lower number of appeal petitions will have had a direct effect on the number of substantive appeals heard. Indeed, the Supreme Court may have exercised a degree of caution at appeal petition stage to avoid the accusation that it was more 'activist' than its predecessor in its willingness to see points of general importance in petitions.[3] The reduction in appeal numbers could also have been attributable to a greater use of larger panels, which inevitably requires a greater deployment of judicial resource and reduces the volume of appeals that the court can process in any year. This trend is discussed in further detail below.

Length of Case

[1]Paterson regards it as 'intellectually dangerous and academically unsound' to rely too heavily on judgments, being the end product of the court. Nevertheless, the judgment is the publication of the court's decision and is the other institutions' starting point. This study differs in focus from Paterson's study (which focussed on the dialogues that led to the judgment) and reviews how the judgments, as end products, are effective in supporting the court's institutional relationships. See *Final Judgment, The Last Law Lords and The Supreme Court* (Hart Publishing, 2013), p64

[2]Paterson, *Final Judgment*, n1, p67-68. There was a peak of 240 appeals in 2003-2005.

[3]See B Dickson, 'The Lords of Appeal and their Work 1967-1996' in *The House of Lords, Its Parliamentary and Judicial Roles* edited by Brice Dickson and Paul Carmichael (Hart Publishing, 1999), p140

Table 1 shows the average length of case for all 246 appeals. The vast majority of cases lasted for 2 days or fewer and it was rare for a case to last for more than 5 days.[4] Tables 2 and 3 demonstrate that although there is a marginal fluctuation in average case length between sessions, there was no discernible difference in the average length of time taken to hear a case between the Appellate Committee and the Supreme Court in the time period.

Table 1. Length of Case Frequencies

	Frequency	Percent	Valid Percent	Cumulative Percent
1 day	68	27.6	27.6	27.6
2 days	118	48.0	48.0	75.6
3 days	44	17.9	17.9	93.5
4 days	12	4.9	4.9	98.4
5 days	1	.4	.4	98.8
Longer than 5 days	3	1.2	1.2	100.0
Total	246	100.0	100.0	

Table 2. Average Length of Case by Court

House of Lords or Supreme Court	Mean	N	Std. Deviation
House of Lords	2.05	129	1.067
Supreme Court	2.08	117	.779
Total	2.06	246	.939

Table 3. Average Length of Case by Session

Session the case was heard in	Mean	N	Std. Deviation
HL 2007-2008	2.05	79	1.049
HL 2008-2009	2.04	50	1.106
SC 2009-2010	1.98	57	.744
SC 2010-2011	2.17	60	.806
Total	2.06	246	.939

[4]This confirms findings by Paterson*, Final Judgment*, n1, p39

The average length of case has continued a downward trajectory from the 1950s-1970s where appeals were, on average, heard over 3-4 days but 'could last for weeks'.[5] It has also dropped marginally since the publication of the 2003 Supreme Court Consultation Paper.[6] This reduction largely reflects restrictions on the length of oral argument and may also be a result of Lord Bingham's reluctance to allocate more than 2 days of the Appellate Committee's time to individual cases.[7] These efficiencies have clearly been maintained in the Supreme Court, notwithstanding Bingham's absence. As well as demonstrating the continued skill of counsel at capturing their main submissions in a succinct manner,[8] it also suggests that the Justices are perhaps limiting the number of interruptions from Bench to Bar.[9] The interchange between counsel and the judges, including the number of 'judicial interventions,'[10] was not specifically reviewed in this study, however the relationship between concurring or dissenting opinions and length of case was measured. A relationship between these variables could indicate that judges who are minded to provide a judgment intervene more in order to test their developing perspectives on the case.[11] Furthermore, cases that move a judge to provide a concurrence or a dissent may have particularly acute issues, where the correct outcome needs to be achieved by looking at the issue from a number of perspectives, and thus more time needs to be allocated. Although there was a slight increase in the length of case where the decision lacked unanimity (see Table 5) and relative to the number of dissenting opinions (see Table 4), unlike concurring opinions, the increase in average hearing time was not conclusively linear and the differences were not statistically significant.[12]

Table 4. Average Length of Case by Number of Dissenting Opinions

Dissent	Mean	N	Std. Deviation
.00	2.02	183	.980
1.00	2.21	28	.787
2.00	2.12	26	.766

[5]Paterson, *Final Judgment*,n1, p34-35
[6]Department of Constitutional Affairs, *A Supreme Court for the United Kingdom* (CP 11/03, July 2003), p16 noted that hearings in the Appellate Committee lasted for an average of 2.5 days.
[7]Paterson, *Final Judgment*, n1, p38-39
[8]Paterson *Final Judgment,* n1, p49
[9]Paterson, *Final Judgment*, n1, p46
[10]Paterson used this term to describe both procedural interventions, such as clarification of page numbers as well as for substantive interventions that tested counsel's arguments; *Final Judgment*, n1, p40
[11]Paterson found that judicial intervention in the Appellate Committee evidenced how the judge was thinking as there was less time during the hearing to exchange views outside the courtroom. In the Supreme Court, a 15 minute meeting prior to the hearing allows preliminary judicial views to be discussed. See *Final Judgment,* n1, p 40, p74-75 and p78-81
[12]$F(3,242)=0.67$, $p = 0.57$

3.00 +	2.33	9	1.000
Total	2.06	246	.939

Table 5. Average Length of Case and Unanimity of Final Appeal Court

Unanimity	Mean	N	Std. Deviation
Yes	2.02	183	.980
No	2.19	63	.800
Total	2.06	246	.939

The number of concurring opinions, by contrast, did have an adverse effect on overall length of case, as can be seen from Table 6 below. This was statistically significant but only at the point where 5 or more concurring opinions were produced.[13] 5 concurring opinions are only possible in panels of 7 Justices or more, demonstrating that these results were in fact related to an increased panel size. Therefore, even if 4 concurring opinions were delivered in a standard 5 Justice panel hearing, this only slightly increased the hearing length and not in a significant way. The panel size section below found that only 9 Justice panels significantly increased the length of case, however these results suggest that a 7 Justice panel can also do so, provided most of the judges are minded to provide a concurring opinion.[14]

Table 6. Average Length of Case by Number of Concurring Opinions (re-coded)

Concur	Mean	N	Std. Deviation
.00	1.83	64	.883
1.00	1.91	33	.678
2.00	2.04	48	.771
3.00	2.09	35	.981
4.00	2.24	55	1.071
5+	3.00	11	1.183
Total	2.06	246	.939

Judicial disagreement marginally increased the length of case and a greater number of opinions also increased the length of case. This may suggest that judges who are minded to provide an opinion do indeed 'interrupt' proceedings more. Nevertheless, the judges have also shown that they may be

[13] This result was statistically significant ($F(8,237) = 3.64$, $p=0.001$). A post-hoc Bonferroni test revealed that the only significant difference was between those cases with no concurring opinions and those with 5+ (mean difference: 1.17, $p = 0.02$, 95%CI 0.29 to 2.06).

[14] See text at n116 below.

prompted to provide an opinion when the court is divided,[15] or where the issues are particularly sensitive or complex.[16] Therefore, the link established between the number of opinions and an increased hearing time may instead be a reflection of the complexity or importance of the issues in the case.

Indeed the importance of the issues did seem to have an influence on the length of case as Table 7 demonstrates that human rights cases, on average, lasted almost half a day longer than the other three broad categories of case. The standard deviation from the mean is slightly higher in human rights cases than for the other categories; however, it is still far below the mean itself and only suggests some variability in individual cases. Thus, where the rights of an individual were affected, the judges took marginally longer to consider the issues. Interestingly *Final Appeal* did not find a great difference between subject matters with the exception of patent hearings that could last 7 or more days and procedural cases that only lasted between 1-2 days.[17] Unlike patent cases at the time of *Final Appeal*, human rights cases are not substantially out of line with the hearing time of other subject matters. Table 7 shows that public law generally dominated the workload of the final appeal court in the time period, however human rights specific cases did not. As such, human rights appeals would only have had a relatively minor impact on the overall efficiency of the final appeal court.

Table 7. Average Length of Case by Subject Matter (re-categorised)

Case_Type	Mean	N	Std. Deviation
HR	2.40	43	1.330
DCAPL	1.98	111	.842
LOPL	2.03	61	.795
INT	1.94	31	.814
Total	2.06	246	.939

One reason for the increased hearing time in human rights cases could be owing to the need to consider the jurisprudence of the ECtHR in addition to any domestic precedent. Chapter 5 examines the role of precedent in the institutional relationship with the lower courts and finds that the final

[15]See e.g. *Maco Door and Window Hardware (UK) Limited v HM Revenue and Customs* [2008] UKHL 54 [49] (per Lord Neuberger)

[16]An issue repeatedly cited by the judges in the time period as a reason for providing a concurring opinion: *Total Network v HMRC* [2008] UKHL 19 [47]; *Spencer-Franks v Kellogg Brown and Root Limited* [2008] UKHL 46 [30]; *R (on the application of JL) v Secretary of State for Justice* [2008] UKHL 68 [85]; *R (On the application of E) v The Governing Body of JFS* [2009] UKSC 15 [55]

[17]L Blom-Cooper and G Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon Press, 1972), p235 and p303

appeal court hearing length increased when the lower court was following precedent.[18] The results displayed in tables 8, 9, 10 and 11 below confirm that the number of comparative citations that appear in the judgment also had an effect on the average length of case, with a positive linear relationship (subject to a few exceptions) found for ECtHR citations, international comparative citations, European comparative citations and domestic comparative citations.

Table 8. Average Length of Case by Number of Strasbourg Citations (re-categorised)

Stras_citations	Mean	N	Std. Deviation
0	1.90	165	.816
1-9	2.14	44	.765
10+	2.70	37	1.309
Total	2.06	246	.939

Table 9. Average Length of Case by Number of International Citations (re-categorised)

Int_citations	Mean	N	Std. Deviation
0	1.95	153	.930
1	1.88	24	.797
2	2.11	19	1.243
3-4	2.23	22	.685
5+	2.68	28	.819
Total	2.06	246	.939

Table 10. Average Length of Case by Number of European Citations (re-categorised)

European	Mean	N	Std. Deviation
0	2.05	233	.957
1+	2.31	13	.480
Total	2.06	246	.939

Table 11. Average Length of Case by Number of Domestic Citations (re-categorised)

Domestic	Mean	N	Std. Deviation
.00	1.98	143	.892
1.00	1.90	42	.878

[18] See text at Chapter 5, n111

2.00	2.22	18	.808
3.00 +	2.42	43	1.118
Total	2.06	246	.939

Whilst this may appear counterintuitive in that cases that consider and apply precedent should be more straightforward, it would appear logical that the more cases cited to and considered by the Justices in oral argument, the longer the oral hearing would be. Whilst 3 or less citations did not affect the length of case in a significant way, more than this began to have an impact.[19] This is perhaps another way of saying that the more concurring opinions there are (and thus the greater number of citations), the longer the case will be. Nevertheless, the connection found between the length of case and the number of comparative citations that appeared in the judgment, alongside the longer hearing time required when the lower court followed precedent suggests that the precedent and comparative authorities are cited and discussed at length in the hearing. The connection may also suggest that it is less common for judges to conduct their own research after the close of oral argument and to use any authorities found in the final judgment. Individual judicial research of this nature may call into question the convention that cases are determined on points of law raised by counsel and tested in an adversarial setting.[20] Taken together, these statistics show the effect that consideration of authority had on the length of case and suggests that the court still relies heavily on the cases cited in the hearing to form the basis of the precedent in the instant case. The point is returned to in Chapter 5; Relationship with lower court when discussing the breadth of the precedent set.

Judgment Gap

[19]International case citations highlighted statistically significant differences ($F(5, 240) = 3.39$, $p = 0.006$). The post hoc analysis revealed that the comparison between zero international citations and 5+ citations was statistically significant (Mean difference = -0.73, $p = 0.002$, 95%CI -1.29 to -0.17). Domestic citations revealed significant differences; $F(3,242) = 3.08$, $p = 0.028$. The post hoc analysis revealed that the comparison between zero and 3+ domestic citations was statistically significant (Mean difference = -0.44, $p = 0.041$, 95%CI -0.87 to -0.01). There was also a statistically significant result between length of hearing and the number of Strasbourg citations ($F(2,243)=12.34$, $p < 0.002$). Post hoc Bonferroni tests revealed statistically significant differences between 0 and 10+ citations (Mean difference = 0.81, $p < 0.0001$) and between 1-9 and 10+ citations (Mean difference = 0.57, $p = 0.015$). The result for European domestic citations $t(244) = 0.97$, $p = 0.33$ was not statistically significant.

[20]Although judicial research does not ordinarily breach this convention, Paterson suggested that it raises the query 'when is material so new that it constitutes a new issue'; *Final Judgment*, n1, p21

Judgment Gap is another measure of the efficiency of the final appeal court and measures the time period from the last day of the hearing to the date when judgment is formally handed down.[21] In *Final Appeal*, Blom-Cooper and Drewry found that the usual judgment gap was 6 weeks including recesses.[22]

During the sample period, there was a positive linear correlation between the judgment gap and the length of case (as reviewed above) with the exception of cases that last for 3 days, or more than 5 days (see Table 12). The longer a case took to hear, the longer it took to hand down judgment. This relationship appeared to support the preliminary conclusions that the length of case increased alongside the number of authorities cited and the number of judicial opinions, as both these factors could also increase the complexity of the judgment writing and the time taken to produce the judgment. Nevertheless, the relationship between judgment gap and length of case was not statistically significant[23] and, as will be seen below, the number of judicial opinions and authority citations did not in fact increase judgment gap. Further data would consequently be needed to confirm if the judgment gap-length of case relationship occurred by chance or whether it had another cause, such as the complexity of the issues in the appeal.

Table 12. Average Judgment Gap by Length of Case (re-categorised)

No of days case lasts for	Mean	N	Std. Deviation
1 day	60.00	68	26.935
2 days	96.50	118	147.623
3 days	85.14	43	40.273
4 days	102.92	12	46.316
5 days	111.00	1	.
Longer than 5 days	58.33	3	30.022
Total	84.28	245	106.288

Tables 13 and 14 removed 8 outliers with excessively long judgment gaps. These cases tended to be where a reference had been made to the CJEU and also one case[24] where no judgment gap was recorded as the conjoined appeals had a split hearing, 3 months apart. The tables reveal that the Supreme Court had the greater average judgment gap and that this difference was statistically significant.[25] These results confirm Paterson's finding that the time taken to produce judgment rose

[21] Judgments are made available to counsel a week before this for error correction; UKSC PD 6; *The Appeal Hearing* at 6.8.1
[22] Blom-Cooper and Drewry, *Final Appeal*, n17, p16
[23] $F(3, 239)=1.15$, $p = 0.34$
[24] *Birmingham City Council v Ali and Moran v Manchester City Council* [2009] UKHL 36
[25] $t(235) = 2.96$, $p = 0.003$

in the handover from Lord Bingham to Lord Phillips, with Lord Phillips being less strict as to when judgments were handed down.[26] The average judgment gap increased between 2008 and 2009, then remained at the same level between 2009 and 2010 before increasing again from 2010 onwards. The differences in sessions were statistically significant[27] with *post hoc* Bonferoni tests revealing statistically significant differences between Sessions 2007-2008 and 2010-2011.[28]

Table 13; Average Judgment Gap by Court

House of Lords or Supreme Court	Mean	N	Std. Deviation
House of Lords	65.87	126	28.706
Supreme Court	78.68	111	37.801
Total	71.87	237	33.816

Table 14; Average Judgment Gap by Session

Session the case was heard in	Mean	N	Std. Deviation
HL 2007-2008	62.35	79	30.421
HL 2008-2009	71.79	47	24.757
SC 2009-2010	71.79	56	38.155
SC 2010-2011	85.71	55	36.446
Total	71.87	237	33.816

A stem and leaf diagram for all 4 years provided a much more accurate visual of the dispersion of appeals, including the 8 outliers, and their respective judgment gap. A minority of appeals had judgment handed down in under 40 days with the vast majority taking somewhere between 41-99 days. A minority of appeals took longer than 100 days, although there were slightly more appeals in this longer category than the under 40 day category.

[26]Paterson, *Final Judgment*, n1, p120-121
[27]$F(3, 233) = 5.45$, $p = 0.001$
[28]Mean difference= 23.35, $p = 0.0001$

Figure 1. Stem & Leaf Plot of Judgment Gap

```
 Frequency    Stem & Leaf

    2.00      0 .  17
    5.00      1 .  34578
   10.00      2 .  1122235777
   19.00      3 .  4444445566666677799
   31.00      4 .  1111111122222333333333444899999
   30.00      5 .  000000011111555555666667778889
   26.00      6 .  11222233333344444444999999
   28.00      7 .  000001111111222566678889999
   20.00      8 .  33333333444455555566
   21.00      9 .  001111122377777788889
    9.00     10 .  344555667
   12.00     11 .  111111138999
    9.00     12 .  555666677
    4.00     13 .  2348
    5.00     14 .  00066
    3.00     15 .  333
    3.00     16 .  789
    8.00 Extremes    (>=173)

 Stem width:      10
 Each leaf:       1 case
```

The average judgment gap did not necessarily increase in a linear fashion for either concurring or dissenting opinions. 2 dissenting opinions appeared to increase the judgment gap significantly, as can be seen from Table 16[29] and interestingly Table 15 also shows a spike in judgment gap where 2 concurring opinions were provided. Caution needs to be attached to these results as the outliers have been included in the tables and given the wide range of recorded judgment gaps, this resulted in a higher standard deviation figure and standard error of mean for 0 concurring opinions and for 2 concurring opinions. Therefore further data needs to be collected to confirm or deny these results. The decision to provide a concurrence or a dissent did not necessarily increase the judgment gap and this may be because the separate judgments are written simultaneously and then circulated among the Justices.

Table 15. Average Judgment Gap by Number of Concurring Opinions

Concur	Mean	N	Std. Deviation	Std. Error of Mean	Minimum	Maximum
.00	81.44	64	163.752	20.469	1	1331
1.00	71.97	32	35.143	6.213	22	153
2.00	107.67	48	137.090	19.787	14	954
3.00	78.57	35	37.717	6.375	22	187
4.00	74.85	55	28.937	3.902	34	167
5.00	105.11	9	32.960	10.987	56	169
8.00	76.50	2	40.305	28.500	48	105
Total	84.28	245	106.288	6.790	1	1331

Table 16. Average Judgment Gap by Number of Dissenting Opinions

Dissent	Mean	N	Std. Deviation	Std. Error of Mean	Minimum	Maximum
.00	81.71	182	119.577	8.864	1	1331
1.00	85.57	28	42.470	8.026	7	211
2.00	99.27	26	65.695	12.884	34	365
3.00	89.00	9	23.848	7.949	48	125
Total	84.28	245	106.288	6.790	1	1331

Although the number of dissenting opinions did not necessarily increase judgment gap, Table 17 shows that a lack of unanimity did. These results were not statistically significant[30] and an increase of 10 days does not support Paterson's suggestion that a divided court results in the judgment gap 'increasing substantially.'[31] It, nevertheless, seems logical that judgments that are not unanimous would take slightly longer to produce, perhaps in a bid to persuade the dissenting judge around to the majority view.

Table 17. Average Judgment Gap and Unanimity of Final Appeal Court

Unanimity HLSC	Mean	N	Std. Deviation
Yes	81.71	182	119.577
No	91.71	63	51.392
Total	84.28	245	106.288

[29] $F(3, 235) = 4.86$, $p = 0.003$. The post hoc Bonferroni tests revealed a significant difference between those cases with no dissenting opinions and those with 2 dissenting opinions (Mean difference: -29.38, $p = 0.005$, 95%CI: -52.41 to -6.36)

[30] $t(243) = 0.64$, $p = 0.52$

[31] Paterson, *Final Judgment*, n1, p121

The lack of relationship between the number of concurring opinions and judgment gap is supported by the fact that a higher volume of comparative citation of authorities in the final judgment did not affect judgment gap in the same way as for the length of case. Table 18 demonstrates that whether European citations were made in the case had a negligible impact on the judgment gap. Table 19 demonstrates no consistent pattern in judgment gap in terms of number of international citations made.[32] Table 20 also demonstrates that the number of domestic comparative citations revealed no obvious pattern or statistically significant results in relation to judgment gap.[33] Finally, Table 21 demonstrates that cases which cited at least one ECtHR case actually had on average a shorter judgment gap than those cases that did not make any ECtHR citations. This shorter time period was not, however, statistically significant.[34] These results do not reveal any strong pattern, however if they reveal anything, it is the counterintuitive conclusion that more authorities cited in the final judgment appeared to reduce judgment gap. Chapter 5, however, supports these findings by demonstrating that the judgment gap was shorter where the lower court was following some kind of precedent. Taken together, these results suggest that following precedent or referring to comparative authorities seems to aid the judgment writing process, as the reasoning in previous cases can facilitate the reasoning process in the instant appeal. Thus the inefficacies of extending hearing time to consider precedent and/or a greater number of authorities seems to be offset by the quicker production of the judgment.

Table 18. Average Judgment Gap and European Citations

EUR Cited	Mean	N	Std. Deviation
No	84.29	232	108.952
Yes	84.08	13	34.659
Total	84.28	245	106.288

Table 19. Average Judgment Gap and Number of International Citations (re-categorised)

International Citations	Mean	N	Std. Deviation
.00	84.96	152	129.418
1.00	63.17	24	27.492
2.00	91.60	20	77.526
3.00	101.50	10	44.665

[32] $F(5,244) = 0.29$, $p = 0.92$
[33] $F(3, 241) = 0.60$, $p = 0.62$
[34] $t(243) = 0.58$, $p = 0.56$

4.00	76.73	11	35.839
5+	90.29	28	42.406
Total	84.28	245	106.288

Table 20. Average Judgment Gap and Number of Domestic Citations (re-categorised)

	Mean	N	Std. Deviation
.00	91.77	142	136.271
1.00	73.90	42	34.387
2.00	66.78	18	30.412
3+	77.00	43	35.740
Total	84.28	245	106.288

Table 21. Average Judgment Gap and Strasbourg Citations (re-categorised)

	Mean	N	Std. Deviation	Minimum	Maximum
No	87.05	164	127.255	7	1331
Yes	78.67	81	37.598	1	173
Total	84.28	245	106.288	1	1331

The fact that the influence of ECtHR authorities assisted in reducing judgment gap, may account for why the longer case length in human rights cases did not continue in terms of judgment gap.[35] Law of obligations/ private law matters had, on average, the longest judgment gap however these differences were not statistically significant.[36] This supports *Final Appeal's* observations that intellectual property and commercial cases can often be quite complex. At the other end of the spectrum, international cases (which included extradition, EU, international law, competition law and conflict of laws) saw judgment handed down quicker than the other subject categories, perhaps because, at least in EU cases, the CJEU determines exactly how the treaties should be interpreted.

[35] *Re W (Children)* [2010] UKSC 12 demonstrates that where matters are not in line with the Convention, such as where the presumption against a child being called to give evidence is not compatible with the fair balancing of the child's and the accused's rights under the Convention, the Supreme Court is prepared to take immediate action. *ReW* had the shortest judgment gap in the whole time period, standing at only 1 day. The Supreme Court did not wish to delay that hearing, given that the children could be at risk of abuse if proper protection measures were not in place.

[36] $F(3,241) = 0.51$, $p = 0.68$

Table 22. Average Judgment Gap and Subject Matter

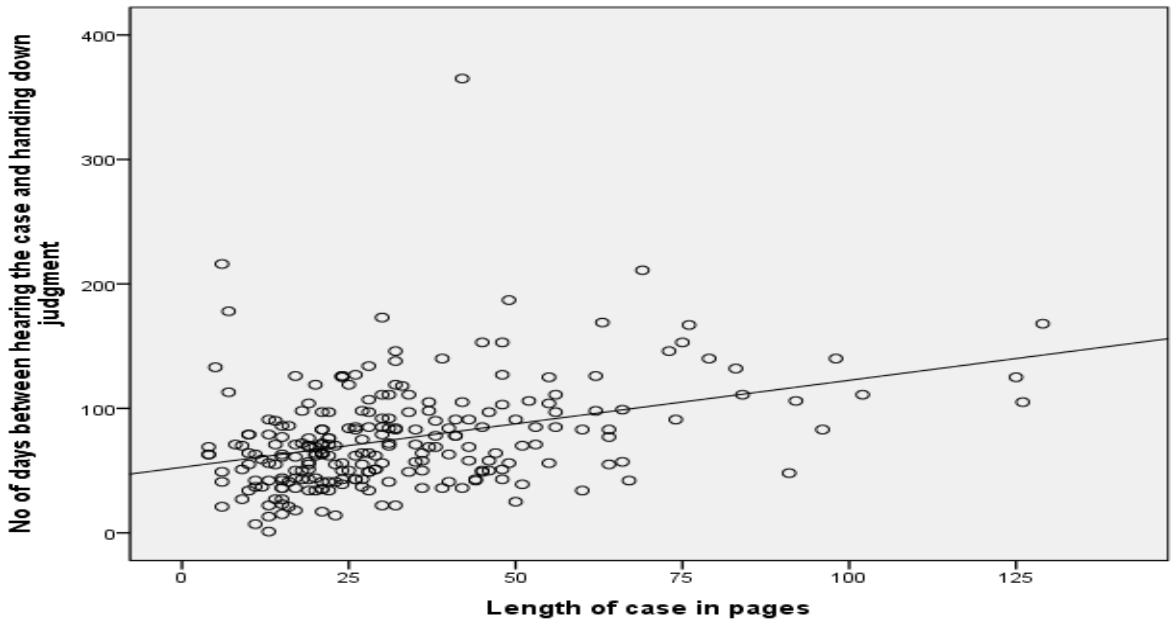
Case_Type	Mean	N	Std. Deviation
HR	84.05	43	34.109
DCAPL	82.31	110	129.122
LOPL	96.23	61	118.279
INT	68.10	31	33.496
Total	84.28	245	106.288

Longer judgments were found to have an effect on judgment gap as confirmed by the modest but statistically significant positive correlation, shown in Figure 2, between the length of judgment in pages and judgment gap.[37] The correlation cannot be explained by the inclusion of comparative authorities in the judgment as that would increase judgment length, yet it was found to reduce judgment gap. Furthermore, there was inconclusive evidence to suggest that the number of concurrences or dissents had an effect on the judgment gap, despite the fact that this had a significant effect on judgment length, as seen below. Instead, the factor that could increase both judgment length and judgment gap may have been the detailed consideration of each authority, through repeat citations, which was not measured in this study. The pattern could also be explained by the inclusion of a detailed review of the background to the appeal or the applicable legislative regime. Indeed, an obvious target for reducing the length of judgments is avoiding repetition of the main facts of the case with each judge's opinion.[38] Furthermore, the longer each individual judicial opinion is, the more time the judges will presumably require to read each other's drafts and perhaps respond to those drafts in their own judgment, thus increasing the judgment gap. Whatever the reason for the association, the strong efficiency correlation between judgment gap and judgment length demonstrates that a reduction in judgment length would have a positive effect on other efficiency measures of the court.

[37] $r = 0.44$, $p < 0.001$

[38] Lord Bingham revealed, in an interview, that an effort was made to avoid this at the First Conference where the fact writing role is assigned, however often a judge will prefer to start from the beginning when writing and there was no method of preventing this. See Paterson, *Final Judgment*, n1, p92-93

Figure 2 Correlation between Judgment Gap (days) and Length of Judgment (pages)



Length of Judgment

The number and complexity of the issues will determine whether a judgment is *capable* of being dealt with succinctly. There is no optimum length of judgment and instead it is a question of each judgment attempting to focus the issues under consideration so that a reduction in the length of the judgment inevitably follows suit. In this sense, Lord Neuberger advocates 'weed[ing] out the otiose.'[39] The excessive length of judgments is a recognised problem for other common law appellate courts with the High Court of Australia, the Supreme Court of Canada and the US Supreme Court judgments all being identified as particularly 'verbose'.[40] The Appellate Committee did attempt to focus the issues. Murphy and Rawlings[41] found that common features in the construction of all Appellate Committee judgments was the assertion of the material that was 'extraneous' and could be disregarded, alongside a 'particularisation' of the issues in order to achieve focus.[42] Nevertheless, there are competing virtues in this field. Brevity may suggest an effective disregard of extraneous aids, however equally length could enable a detailed and extensive review of the

[39]Lord Neuberger, 'No Judgment- No Justice' (First Annual Bailli Lecture, 20 November 2012), p9 <www.supremecourt.uk/docs/speech-121120.pdf>last accessed 22 February 2016

[40]L Blom-Cooper, 'Style of Judgments' in L Blom-Cooper, B Dickson and G Drewry (eds),*The Judicial House of Lords 1876-2009*, p160

[41]The study covered a total of 58 cases and examined the presentation of Appellate Committee decisions and reasons provided for those decisions made by the 14 Law Lords that served in the 12 months from October 1979; WT Murphy and RW Rawlings, 'After the Ancien Regime: The Writing of Judgments in the House of Lords 1979/1980' (1981) 44 MLR 617

[42]Murphy and Rawlings, 'After the Ancien Regime' [1981], n41, 621-622

authorities, sufficient explanation and evidence based reasoning. Reasoning, as seen in Chapter 5, forms the backbone of precedent and 'it is unlikely that a modern decision unaccompanied by reasoning would ever be considered much of a precedent.'[43] The technical skill of Supreme Court judgment writing could lie in the art of reducing judgment length without compromising on reason. As Lord Walker revealed to Paterson in the context of oral advocacy, 'sometimes the most effective advocacy is quite brief and has at any rate a superficial appearance of simplicity although no doubt there is an awful lot of art that goes into that.'[44]

Tables 23 and 24 demonstrate that there was very little change in the average length of judgments between the Appellate Committee and the Supreme Court. The mean number of pages was 33 across all 4 years, with the Appellate Committee mean being 31 pages and the Supreme Court mean being 35 pages. The range was broadly similar with the Appellate Committee number of pages ranging between 4- 129 pages and the Supreme Court mean ranging between 5- 126 pages. The stem and leaf diagram at Figure 3 reveals that the most common length of judgment is somewhere between 10-34 pages with a substantial cluster falling in the 15-24 pages grouping.

Table 23. Average Length of Judgment by Court

House of Lords or Supreme Court	Mean	N	Std. Deviation	Minimum	Maximum
House of Lords	31.18	129	20.263	4	129
Supreme Court	35.37	117	24.446	5	126
Total	33.17	246	22.402	4	129

Table 24. Average Length of Judgment by Session

Session	Mean	N	Std. Deviation	Minimum	Maximum
HL 2007-2008	29.03	79	19.001	4	92
HL 2008-2009	34.58	50	21.876	9	129
SC 2009-2010	31.53	57	24.330	5	126
SC 2010-2011	39.02	60	24.193	6	125
Total	33.17	246	22.402	4	129

[43] N Duxbury, *The Nature and Authority of Precedent* (CUP, 2008), p65
[44] Paterson, *Final Judgment*, n1, p43

Figure 3. Stem and Leaf Plot of Length of Case in Pages

```
 Frequency    Stem & Leaf

    3.00      0 .  444
   11.00      0 .  56666778999
   23.00      1 .  00000111112233333334444
   35.00      1 .  55555555555666777777788889999999999
   36.00      2 .  000000111111111111222222233334444444
   27.00      2 .  555566666677777788888888999
   23.00      3 .  00000001111112222223444
   16.00      3 .  5555666677788899
   14.00      4 .  00011122233344
   15.00      4 .  555566678888899
    8.00      5 .  00112334
    6.00      5 .  555666
    9.00      6 .  002234444
    4.00      6 .  6679
    2.00      7 .  34
    3.00      7 .  569
   11.00 Extremes    (>=83)

 Stem width:      10
 Each leaf:       1 case(s)
```

There were 11 outliers that had a judgment length of 83 pages or more; 4 arose in the Appellate Committee and 7 in the Supreme Court. These outliers are displayed in Table 25 below. Together, the outliers had an average judgment length of 102 pages. Although the Supreme Court had a greater number of extremely lengthy judgments during the time period, the net effect of this was counterbalanced by shorter judgments, as the average judgment length was not that much higher in the Supreme Court than the Appellate Committee.

Table 25. Length of Judgment (outliers)

Case	Pages
Total Network SL (a company incorporated in Spain) (Original Respondents and Cross-appellants) v HMRC (suing as Commissioners of Customs and Excise) (Ord App and Cross-res) [2008] UKHL 19	92
R (on the application of Bancoult) (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant) [2008] UKHL 61	84
RB (Algeria) and another (Appellants) v S of S for the Home Department (Res); OO (Jordan) (Original Rest and X App)v S of S for the Home Department (Orig App and X Res) [2009] UKHL 10	105
Moore Stephens (a firm) (Respondents) v Stone Rolls Limited (in liquidation) (Appellants) [2009] UKHL 39	129
R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appellants) [2009] UKSC 15	91
Her Majesty's Treasury (Respondent) v Mohammed Jaber Ahmed and others (FC) (Appellants) [2010] UKSC 2	102
R (on the application of Smith) (Respondent) v Secretary of State for Defence and another (Appellants) [2010] UKSC 29	126

Sienkiewicz (Administratrix of Enid Costello deceased) (Resp) v Grief (UK) Limited (Appellant) Knowsley Metropolitan council (App) v Willmore (Resp) [2011] UKSC 10	83
Walumba Lumba 1 and 2 and Kadian Mighty (Appellants) v Secretary of the State for the Home Department (Respondents) [2011] UKSC 12	125
Baker (Respondent) v Quantum Clothing Group Limited (Appellants) and others [2011] UKSC 17	98
R (on the app of Adams)(FC)(Appellant) v S of S for Justice; App by Eamonn MacDermott for Judicial Review (NI); App by Raymond Pius McCartney for Judicial Review (NI) [2011] UKSC 18	96

Paterson found that the Justices of the Supreme Court wrote fewer individual opinions but wrote more paragraphs when they did write an opinion.[45] The net effect of this was only a marginal increase in the overall number of pages in the judgment. Thus, for every judge that wrote a few paragraphs more, an opinion was produced to which one or more judges joined.[46] This pattern seems to strike an appropriate balance between reducing the distraction of too many individual opinions, yet not compromising on the level of reasoning provided by the judges who do provide an opinion.

Table 26 demonstrates that the more judges that provided an opinion, the greater the length of the judgment. There was a positive linear, statistically significant,[47] relationship between the length of judgment in pages and the number of concurring opinions. Table 27 revealed a multitude of significant relationships from the *post hoc* Bonferroni test. There were significant differences between 0 and 1,2,3,4 and 5 concurring opinions, demonstrating the significant effect on judgment length of issuing a multi-opinion rather than a single opinion judgment. Furthermore, the significance lying between 1-4 and 1-5 concurring opinions shows that once there was one concurring opinion, it did not make a statistically significant difference to the overall judgment length to have a second or third concurring opinion but it did to have a fourth. There were more instances of 4 concurring opinions than 2 or 3 across the 4 years although, as per Table 40 below, the average number of concurring opinions was less than this. Therefore reducing the number of concurring opinions by just 1 or 2 in these instances would have a significant effect in reducing judgment length and improving the efficiency of the court.

Table 26. Average Length of Judgment and Number of Concurring Opinions

Concur	Mean	N	Std. Deviation
.00	15.64	64	7.623
1.00	28.09	33	15.495
2.00	35.12	48	23.132

[45]Paterson, *Final Judgment*, n1, p106-107

[46]Paterson found this style of judgment to be gradually rising year on year from 12.5% of cases in 2009 to 96% of cases up to the end of July 2013; *Final Judgment*, n1, p107

[47]$F(5,239) = 28.67$, $p < 0.0001$

3.00	35.74	35	15.719
4.00	44.55	55	19.137
5.00	69.78	9	27.865
8.00	108.50	2	24.749
Total	33.17	246	22.402

Table 27. Post hoc Bonferroni tests for Length of Judgment and Number of Concurring Opinions (incidences of 8 concurring opinions were too small to include in the table)

					95% Confidence Interval	
(I) New_Concur	(J) New_Concur	Mean Difference (I-J)	Std. Error	Sig.	Lower Bound	Upper Bound
.00	1.00	-12.450*	3.762	.016	-23.60	-1.30
	2.00	-19.484*	3.352	.000	-29.42	-9.55
	3.00	-20.102*	3.690	.000	-31.04	-9.16
	4.00	-28.905*	3.227	.000	-38.47	-19.34
	5.00	-61.178*	5.729	.000	-78.16	-44.19
1.00	.00	12.450*	3.762	.016	1.30	23.60
	2.00	-7.034	3.969	1.000	-18.80	4.73
	3.00	-7.652	4.259	1.000	-20.28	4.98
	4.00	-16.455*	3.865	.000	-27.91	-5.00
	5.00	-48.727*	6.111	.000	-66.85	-30.61
2.00	.00	19.484*	3.352	.000	9.55	29.42
	1.00	7.034	3.969	1.000	-4.73	18.80
	3.00	-.618	3.902	1.000	-12.19	10.95
	4.00	-9.420	3.467	.106	-19.70	.86
	5.00	-41.693*	5.868	.000	-59.09	-24.30
3.00	.00	20.102*	3.690	.000	9.16	31.04
	1.00	7.652	4.259	1.000	-4.98	20.28
	2.00	.618	3.902	1.000	-10.95	12.19
	4.00	-8.803	3.795	.318	-20.06	2.45
	5.00	-41.075*	6.067	.000	-59.06	-23.09
4.00	.00	28.905*	3.227	.000	19.34	38.47
	1.00	16.455*	3.865	.000	5.00	27.91
	2.00	9.420	3.467	.106	-.86	19.70
	3.00	8.803	3.795	.318	-2.45	20.06
	5.00	-32.273*	5.798	.000	-49.46	-15.08
5.00	.00	61.178*	5.729	.000	44.19	78.16
	1.00	48.727*	6.111	.000	30.61	66.85

	2.00	41.693*	5.868	.000	24.30	59.09
	3.00	41.075*	6.067	.000	23.09	59.06
	4.00	32.273*	5.798	.000	15.08	49.46

*. The mean difference is significant at the 0.05 level.

Table 28 shows that there was also an increasing linear, statistically significant,[48] relationship between the number of dissenting opinions and the length of the judgment. The *post hoc* Bonferroni tests, displayed in Table 29, demonstrated a significant relationship between 0 and 1,2 and 3+ dissenting opinions, between 1 and 3+ dissenting opinions and between 2 and 3+ dissenting opinions. As such, it made a statistically significant difference to judgment length when a dissent was provided, however once one dissent was provided it only significantly affected judgment length if three or more justices provided a dissent. This number of dissenting judges indicates a split panel and the results suggest that, in those circumstances, each judge would devote more pages to justifying their individual position over that of the opposing side. These results were supported by the data displayed in Table 30 whereby the average length of judgment approximately doubled where there was no unanimity in the final appeal court, compared to when there was unanimity. This difference was statistically significant.[49] Dissents and division were therefore not conducive to reducing the length of judgments. As seen below, dissents were more common in the Supreme Court and may partly account for the longer judgment length in that court.

Table 28. Average Length of Judgment and Number of Dissenting Opinions

Dissent	Mean	N	Std. Deviation
.00	26.51	183	16.093
1.00	44.25	28	19.759
2.00	52.88	26	25.852
3+	77.22	9	34.347
Total	33.17	246	22.402

Table 29. Post hoc Bonferroni tests for Length of Judgment and Number of Dissenting Opinions

		Mean			95% Confidence Interval	
(I) Dissent	(J) Dissent	Difference (I-J)	Std. Error	Sig.	Lower Bound	Upper Bound
.00	1.00	-17.742*	3.777	.000	-27.79	-7.70
	2.00	-26.376*	3.901	.000	-36.75	-16.00
	3.00	-50.714*	6.354	.000	-67.62	-33.81

[48] $F(3,246) = 37.66$, $p < 0.0001$
[49] $t(233) = 7.89$, $p < 0.0001$

1.00	.00	17.742*	3.777	.000	7.70	27.79
	2.00	-8.635	5.069	.539	-22.12	4.85
	3.00	-32.972*	7.131	.000	-51.94	-14.00
2.00	.00	26.376*	3.901	.000	16.00	36.75
	1.00	8.635	5.069	.539	-4.85	22.12
	3.00	-24.338*	7.198	.005	-43.48	-5.19
3.00	.00	50.714*	6.354	.000	33.81	67.62
	1.00	32.972*	7.131	.000	14.00	51.94
	2.00	24.338*	7.198	.005	5.19	43.48

*. The mean difference is significant at the 0.05 level.

Table 30. Average Length of Judgment and Unanimity of Final Appeal Court

Unanimity_HL	Mean	N	Std. Deviation
No	52.52	63	26.669
Yes	26.51	183	16.093
Total	33.17	246	22.402

As with length of case, Table 31 demonstrates that human rights cases had on average the longest judgment length and this result was statistically significant.[50] The *post hoc* Bonferroni tests shown in Table 32 revealed significant differences between human rights cases and both domestic, constitutional and public law cases and also international cases.

Table 31. Average Length of Judgment by Subject Matter

Case_Type	Mean	N	Std. Deviation	Minimum	Maximum
HR	42.12	43	24.407	10	126
DCAPL	28.92	111	18.846	4	96
LOPL	37.79	61	25.293	7	129
INT	26.90	31	20.423	4	102
Total	33.17	246	22.402	4	129

Table 32. Post hoc Bonferroni tests for Length of Judgment by Subject Matter

					95% Confidence Interval	
(I) Case_Type	(J) Case_Type	Mean Difference (I-J)	Std. Error	Sig.	Lower Bound	Upper Bound
HR	DCAPL	13.197*	3.915	.005	2.78	23.61
	LOPL	4.329	4.340	1.000	-7.22	15.88

[50] $F(3,231) = 6.40$, $p < 0.0001$

	INT	15.213*	5.136	.020	1.55	28.88
DCAPL	HR	-13.197*	3.915	.005	-23.61	-2.78
	LOPL	-8.868	3.474	.068	-18.11	.37
	INT	2.016	4.428	1.000	-9.76	13.80
LOPL	HR	-4.329	4.340	1.000	-15.88	7.22
	DCAPL	8.868	3.474	.068	-.37	18.11
	INT	10.884	4.808	.147	-1.91	23.67
INT	HR	-15.213*	5.136	.020	-28.88	-1.55
	DCAPL	-2.016	4.428	1.000	-13.80	9.76
	LOPL	-10.884	4.808	.147	-23.67	1.91

*. The mean difference is significant at the 0.05 level.

Again, this result seems to be related to the volume of citations made in such cases. Table 33 demonstrates statistically significant associations between the length of case in pages and ECtHR, international and domestic citations. The strongest association was shown between length of case in pages and the number of international citations (r=0.53).[51]

Table 33. Association between Length of Judgment and Number of Strasbourg, European, International and Domestic Citations

		Length of case in pages	No of times different European comparative caselaw is cited	Stras_citations	No of times different domestic authorities are cited	No of times different International comparative caselaw is cited
Length of case in pages	Pearson Correlation	1	.108	.326**	.154*	.528**
	Sig. (2-tailed)		.091	.000	.016	.000
	N	246	246	246	246	246
No of times different European comparative caselaw is cited	Pearson Correlation	.108	1	.018	.045	.099
	Sig. (2-tailed)	.091		.773	.482	.121
	N	246	246	246	246	246
Stras_citations	Pearson Correlation	.326**	.018	1	.167**	.074
	Sig. (2-tailed)	.000	.773		.009	.246
	N	246	246	246	246	246

[51]Note that there was a slight, positive association between the number of international citations and the length of the case in days (r = 0.24, p < 0.001) but no association between citations and judgment gap (r = 0.034, p 0.59).

No of times different domestic authorities are cited	Pearson Correlation	.154*	.045	.167**	1	.055
	Sig. (2-tailed)	.016	.482	.009		.387
	N	246	246	246	246	246
No of times different International comparative caselaw is cited	Pearson Correlation	.528**	.099	.074	.055	1
	Sig. (2-tailed)	.000	.121	.246	.387	
	N	246	246	246	246	246

**. Correlation is significant at the 0.01 level (2-tailed).

*. Correlation is significant at the 0.05 level (2-tailed).

In summary, the relationship between judgment length and judgment gap has been established as well as the effect that concurring and dissenting opinions and authority citation appeared to have on these two efficiency measures. At this juncture it is illustrative to examine the data on the style of judgment and the extent to which the single or multi-opinion judgment style contributed to the institutional efficiency of the court.

Judgment Style

Single judgments

The statistics demonstrate that the Supreme Court is increasingly moving towards single judgments of the court, now that judgments no longer have to be delivered as speeches.[52] The benefits of this as against the inevitable compromises that it entails have long been debated.[53] From the perspective of the court's institutional relations, a single judgment provides the court with a voice thereby allowing for a level of institutional and not just individual accountability.[54] It also appears to provide more instant clarification of the legal position following the decision and could support institutional communication. As will be seen in Chapters 5 and 6, the clarity of precedent plays a key role in institutional relations between the domestic courts. The clarity of the decision may therefore enhance the functioning of the system of precedent in the short term. Nevertheless, this certainty of

[52]Lady Hale noted that she and her judicial assistant were 'surprised' at the level of plurality of opinion in the first year of the Supreme Court, with 20 judgments of the court and a further 11 cases that had some form of plurality of opinion, be it the majority judgment or otherwise. See 'Judgment writing in the Supreme Court' (First Anniversary Seminar, 30 September 2010), p2 <https://www.supremecourt.uk/docs/speech_100930.pdf>accessed 22 February 2016

[53]See Paterson, *The Law Lords* (Macmillan Press, 1982), p184-186

[54]Le Sueur felt the Appellate Committee's use of multiple opinions increased individual judicial accountability; however, it did little to ease comprehension of the majority view and thus institutional accountability; 'Developing Mechanisms for judicial Accountability in the UK' (2004) 24 (1/2) LS 73, 90

approach could have detrimental long-term effects were it to reduce flexibility in the authority's application and be applied by the lower courts in a manner akin to an 'Act of Parliament'.[55]

The multi-opinion judgment, by contrast, can accommodate different judicial perspectives from different specialist areas and may be of more assistance in clarifying the law as it stands or supporting the future development of the law.[56] Furthermore, the quality of multi-opinion judgments need not be compromised in an effort to retain a united view.[57] Nevertheless, the benefits of multi-opinion judgments have to be measured in the context of the number of concurring opinions provided. The more concurring opinions provided, the more difficult it may be for future lower courts to interpret the meaning behind each individual opinion[58] and as seen above, the more likely it is to have a significant impact on the efficiency of the court. The individual nature of concurrences can mean that they do not necessarily complement one another or correlate in lines of reasoning.[59] This particular difficulty was found to be the most profound in the instant study when it came to ascertaining the issues to be determined under the appeal. Often, the Justices would have their own opinion on what the true issues to be determined were and they would write their judgment on the basis of their own assessment of the case. Thus each concurring opinion could reach the same result but have taken a very unique line of reasoning to reach that point. This particular finding supports the need for the court to issue an agreed statement of both the facts and legal issues raised. A statement of this nature would also dispense with the need for multiple recitals of the facts and thus facilitate the reduction of judgment length, without compromising on reasoning. *Final Appeal* also made a forceful call to assenters to focus on the value gained from publishing their opinion[60] and recommended that assenting opinions should not become part of the *ratio decidendi* of the case.[61] This recommendation was made on the basis that the majority of lawyers thought an authoritative court should speak clearly and with one voice.[62] Indeed, there is precedent for such a style of judgment in the JCPC, which traditionally provided collective legal advice to the sovereign.[63]

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[55]Lord Reid, 'The Judge as Law Maker' [1972] JSPTL 22, 26

[56]Bingham, 'The Rule of Law', (2007) 66 CLJ 67, 70-71, a view which he believes Lord Reid would have shared. Blom-Cooper and Drewry also felt that in a system of *stare decisis,* concurring opinions helped to explain the result of the case and acted as useful guidance for future cases; *Final Appeal*, n17, p80

[57]The compromised nature of collective judgments is an issue in the JCPC. See Paterson, *Final Judgment*, n1, p91

[58]Blom-Cooper and Drewry, *Final Appeal*, n17, p90

[59]Blom-Cooper and Drewry, *Final Appeal*, n17, p90

[60]Blom-Cooper and Drewry, *Final Appeal*, n17, p95

[61]Blom-Cooper and Drewry, *Final Appeal*, n17, p94

[62]Blom-Cooper and Drewry, *Final Appeal*, n17, p80

[63]Judicial Committee (Dissenting opinion) Order in Council 1966.

Tables 34 and 35 reveal that the Appellate Committee increased the proportion of single judgments issued since *Final Appeal*[64] and that there was a further 10% increase in the volume of single judgments issued by the Supreme Court. The proportion of single judgments in the Appellate Committee was 19% (7% being composite or collective judgments and 12% being a single judgment with others formally concurring).[65] In the Supreme Court, the proportion of single judgments was 30% (26% being composite or collective and 4% being a single judgment with others formally concurring). There was a slight variation between sessions, with 2007-2008 returning 24% of its judgments as single judgments, with 2008-2009 returning 12% of its judgments as single judgments, 2009-2010 returning 35% of its judgments as single judgments and 2010-2011 returning 27% of its judgments as single judgments. There has also been a change in the style of the single judgment issued, with the Supreme Court favouring the composite/collective style and the Appellate Committee favouring the single judgment with others formally concurring. As a result, the Appellate Committee's increased use of single judgments was not exclusively attributable to Lord Bingham's introduction of the single opinion of the Committee in criminal appeals,[66] it was also largely attributable to Law Lords increasingly choosing to formally concur. This judgment style allowed the Appellate Committee to produce single judgments, whilst respecting the convention for all Law Lords to 'speak' and thus provide an opinion.

Table 34. Single Judgments by Court

		House of Lords or Supreme Court		
		House of Lords	Supreme Court	Total
Was the case a single judgment case?	No	104	81	185
	Yes-composite or collective judgment	9	31	40
	Yes- Single judgment with others only formally concurring	16	5	21
Total		129	117	246

[64]Blom-Cooper and Drewry did not distinguish between type of single judgment. They found the overall proportion of single judgment cases to be 11.3% with it being deployed most often in criminal or Scottish appeals; Final Appeal, n17, p184

[65]Between 2001-2009, the proportion of single judgments in the Appellate Committee was always less than 20% of its total caseload, however in the years prior to that it was higher, reaching peaks of 68% in 1985 under the presidency of Lord Diplock and 70% in 1993 under Lord Keith. Figures taken from Paterson, *Final Judgment,* n1, p100-102 and Table 3.2.

[66]See Paterson, *Final Judgment*, n1, p92

Table 35. Single Judgments by Session

		Session the case was heard in				
		HL 2007-2008	HL 2008-2009	SC 2009-2010	SC 2010-2011	Total
Was the case a single judgment case?	No	60	44	37	44	185
	Yes- composite or collective judgment	7	2	18	13	40
	Yes- Single judgment with others only formally concurring	12	4	2	3	21
Total		79	50	57	60	246

Single judgments were found to increase the institutional efficiency of the court, although it is acknowledged that all judges in the case will still have made some level of contribution.[67] Table 36 demonstrates that both styles of single judgment were shorter in a statistically significant way.[68] These judgments were, on average, less than half the average length of judgments that included concurring and/or dissenting opinions. Hearings that eventually resulted in a composite/collective judgment were, on average, shorter, supporting the preliminary conclusion above that judges who are minded to provide an opinion may interrupt more, however this was not statistically significant.[69] Table 36 demonstrates that whereas composite/collective judgments had a shorter judgment gap than judgments with concurring or dissenting opinions, the opposite was true of single judgments with the other judges formally concurring. This could be because single judgments with formal concurrences may start off as multi-opinion judgments, however after circulation of the draft judgments, some judges may decide to formally concur to avoid duplicity.[70] Again these results were not found to be statistically significant.[71] Nevertheless, it is clear that the Supreme Court's preference for the composite/ collective style of single judgment has the potential to increase the

[67] All judges will read and perhaps amend the single judgment as was the practice in the Privy Council. Dickson, 'The Lords of Appeal and their work', n3, p151. Single judgments can be written in different ways. Paterson compared *Norris v USA* [2008] UKHL 16 where several sections were written by different Law Lords with *Manchester City Council v Pinnock* [2010] UKSC 45 which was written by one judge with suggestions from the other judges; *Final Judgment*, n1, p87

[68] $F(2,243) = 32.99$, $p < 0.0001$

[69] $F(2,243)=2.46$, $p = 0.088$

[70] See Paterson, *Final Judgment*, n1, p99

overall efficiency of the court far more the Appellate Committee's preference for a single judgment with the others formally concurring.

Table 36. Single Judgment and Average Length of Judgment, Judgment Gap and Length of Case

		N	Mean	Std. Deviation
No of days case lasts for	No	185	2.14	.943
	Yes-composite or collective judgment	40	1.88	.911
	Yes- Single judgment with others only formally concurring	21	1.76	.889
	Total	246	2.06	.939
No of days between hearing the case and handing down judgment	No	184	84.86	76.728
	Yes-composite or collective judgment	40	67.28	43.650
	Yes- Single judgment with others only formally concurring	21	111.62	280.847
	Total	245	84.28	106.288
Length of case in pages	No	185	39.10	22.559
	Yes-composite or collective judgment	40	15.40	8.127
	Yes- Single judgment with others only formally concurring	21	14.76	4.888
	Total	246	33.17	22.402

There are clearly efficiency gains to be made from having composite style single judgments; however, such judgments may be compromised in terms of content. Only comparative and academic citations were empirically measured in this study, however, these statistics do reveal significant sacrifices in content where a single judgment was delivered. Table 37 collapses the two types of single judgment into one category and then tests for significance. With the exception of European comparative case law,[72] the average number of citations decreased significantly when a single judgment was delivered: international comparative,[73] domestic comparative[74] and Strasbourg.[75] In

[71] $F(2,242) = 1.21$, $p = 0.30$
[72] $t(244) = 0.77$, $p = 0.44$
[73] $t(244) = 3.31$, $p = 0.001$
[74] $t(244) = 2.19$, $p = 0.03$

terms of content, the multi-opinion judgment, with concurrences and dissents was by far the preferable option.

Table 37. Single Judgment and Average Number of European, Domestic, International and Strasbourg Citations

SINGLE		No of times different European comparative caselaw is cited	No of times different domestic authorities are cited	No of times different academics are cited	No of times different International comparative caselaw is cited	No of different Strasbourg authorities cited by division/ chamber
No	Mean	0.19	1.75	5.07	2.43	4.51
	N	185	185	185	185	185
	Std. Deviation	1.461	3.531	5.971	4.988	8.163
Yes	Mean	0.05	0.7	1.3	0.31	1.16
	N	61	61	61	61	61
	Std. Deviation	0.284	2.052	2.171	0.847	3.95
Total	Mean	0.16	1.49	4.13	1.91	3.68
	N	246	246	246	246	246
	Std. Deviation	1.276	3.256	5.532	4.439	7.481

Concurring and Dissenting Opinions

Concurring and dissenting opinions are categorised as such according to their end result; however, characteristically they are very similar in that each may contain areas of agreement and disagreement. *Final Appeal* observed that concurrences will normally agree with the disposal of the case on the facts, albeit sometimes via a different legal pathway, whereas a dissent may agree with the legal rule to be applied but disagree with the way that the majority applied it on the facts.[76] In the middle are partial dissents,[77] where the Justices appear to disagree with the opinion of the majority but then refrain from following these doubts through to outright dissent, as it will make

[75] $t(244) = 3.08$, $p = 0.002$

[76] Blom-Cooper and Drewry, *Final Appeal*, n17, p79

[77] Blom-Cooper and Drewry used a 'partial dissent' category i.e. if the judge's reasoning 'would have produced a different result only on a subsidiary matter.' The authors admit however that 'sometime a 'partial dissent' is hard to distinguish from an assent in result reached by different argument.'; *Final Appeal,* n17, p184.

little difference to the appeal's outcome. The partial dissent shows that outright dissent is reserved for the truly deserving cases and unanimity should be sought wherever possible.[78]

The statistics revealed an empirical link between concurrence and dissent. Table 38 demonstrates that, on average, there was almost twice the number of concurring opinions where the judicial panel was divided on at least one issue than when it was unanimous. This result was statistically significant.[79] The coding of a judge's position, in this study, meant that it was possible for an opinion to concur on some issues and dissent on others. Therefore the results in Table 38 may partially reflect the fact that elements of a dissenting opinion will occasionally concur with one or more issues at the same time. Table 39 does suggest that as the number of dissents increased in a case, it was proportionately more common to have at least 4 concurrences. The results in Table 38 could, nevertheless, indicate that division in the court was one of the reasons that prompted a judge to provide a concurring opinion and thus confirm Lee's argument that judges provide concurring opinions out of 'respect' to their colleagues in a divided court.[80] Nevertheless, a degree of caution needs to be exercised owing to how concurrences and dissents were coded in the study.

Table 38. Average Number of Concurring Opinions and Unanimity of Final Appeal Court

SCHL_Unanimity	Mean	N	Std. Deviation
SC/HL Divided	3.32	63	1.674
SC/HL Unanimous	1.72	183	1.605
Total	2.13	246	1.763

Table 39. Relationship between Number of Dissenting Opinions and Number of Concurring Opinions

		No of dissenting opinions provided in the case						
		0	1	2	3	4	5	Total
No of concurring opinions provided in the case	0	61	3	0	0	0	0	64
	1	29	1	3	0	0	0	33
	2	34	5	9	0	0	0	48
	3	26	7	2	0	0	0	35
	4	29	11	11	3	1	0	55
	5	2	1	0	0	0	0	3
	6	0	0	1	2	0	0	3

[78] Blom-Cooper and Drewry criticised the latent dissent on the basis that it compromised the 'vigorous intellectual integrity' of the judges; *Final Appeal*, n17, p27 and p86

[79] $t(243) = 6.74$, $p < 0.0001$

[80] J Lee, 'A Defence of Concurring Speeches' [2009] PL 305, 324

	7	2	0	0	0	0	1	3
	8	0	0	0	1	1	0	2
Total		183	28	26	6	2	1	246

Tables 40 and 41 show that there were slightly more concurring opinions, on average, in the Appellate Committee (between 2-3) than in the Supreme Court (between 1-2), and this was true of all sessions. The average number of concurring opinions in the Appellate Committee has decreased since the time of *Final Appeal* (averaging between 3-4)[81] and the results indicate that the Justices appear to be making a conscious, although not yet statistically significant,[82] move towards reducing concurring opinions further in the Supreme Court. These statistics support Paterson's finding that there is 'now a prevailing view amongst the Justices that concurrences should be curbed unless they are going to add something to the lead judgment.'[83]

Since this study, the trend has continued downward, suggesting that statistically significant results may be returned in the future.[84] The reduction in concurrences may, however, not be universally welcomed. James Lee, writing in support of concurring opinions, felt that they provide a 'third dimension to common law reasoning', allowing a distinction to be drawn between outcome and reasoning.[85] In this sense, concurring opinions may arrive at the outcome from a different perspective and thus strengthen precedent by providing additional guidance to lower courts.[86] He also noted the 'buttressing' function of concurrences, particularly where there was a strong dissent.[87] Concurring opinions can, therefore, have value.

Table 40. Average Number of Concurring Opinions by Court

House of Lords or Supreme Court		No of concurring opinions provided in the case
House of Lords	Mean	2.33
	N	129
	Std. Deviation	1.602
Supreme Court	Mean	1.91

[81]It was also common for 5 full length speeches to be handed down; Blom-Cooper and Drewry*, Final Appeal*, n17, p82 and 401-402. This reduction in concurrences is despite the fact that Lord Bingham was known to be more relaxed towards dissenting and concurring opinions under his presidency; Paterson, *Final Judgment*, n1, p115

[82]$t(244) = 11.36$, $p = 0.068$, and $F(3,242) = 1.39$, $p = 0.25$ respectively.

[83]Paterson*, Final Judgment*, n1, p108

[84]Paterson, *Final Judgment*, n1, p109

[85]Lee, 'A Defence of Concurring Speeches', n80, p318

[86]Lee, 'A Defence of Concurring Speeches', n80, p329

[87]Lee, 'A Defence of Concurring Speeches', n80, 315-316

	N	117
	Std. Deviation	1.910
Total	Mean	2.13
	N	246
	Std. Deviation	1.763

Table 41. Average Number of Concurring Opinions by Session

Session the case was heard in		No of concurring opinions provided in the case
HL 2007-2008	Mean	2.22
	N	79
	Std. Deviation	1.646
HL 2008-2009	Mean	2.50
	N	50
	Std. Deviation	1.529
SC 2009-2010	Mean	1.89
	N	57
	Std. Deviation	2.050
SC 2010-2011	Mean	1.93
	N	60
	Std. Deviation	1.784
Total	Mean	2.13
	N	246
	Std. Deviation	1.763

In the 2007-2011 period, there was a marginally higher dissent rate recorded in the Supreme Court compared to the Appellate Committee across all sessions (See Tables 42 and 43). This suggests that the increase in single judgments in the Supreme Court did not translate into a greater overall unanimity rate, as instances of dissent in fact increased. The quantitative data on 'panel size' below may provide a reason for this, as it indicates that the Supreme Court sat in larger panel sizes more frequently than the Appellate Committee and that larger panels tended to include more concurrences and dissent. Despite this apparent rise in disagreement, it must be remembered that

dissent was still used 'sparingly' in the Supreme Court, at less than 1 dissenting opinion on average per case, and in most cases the Supreme Court was both authoritative *and* united.[88]

Table 42. Average Number of Dissenting Opinions by Court

House of Lords or Supreme Court		No of dissenting opinions provided in the case
House of Lords	Mean	.38
	N	129
	Std. Deviation	.752
Supreme Court	Mean	.53
	N	117
	Std. Deviation	1.013
Total	Mean	.45
	N	246
	Std. Deviation	.887

Table 43. Average Number of Dissenting Opinions by Session

Session the case was heard in		No of dissenting opinions provided in the case
HL 2007-2008	Mean	.34
	N	79
	Std. Deviation	.696
HL 2008-2009	Mean	.44
	N	50
	Std. Deviation	.837
SC 2009-2010	Mean	.54
	N	57
	Std. Deviation	1.070
SC 2010-2011	Mean	.52
	N	60
	Std. Deviation	.965

[88]Blom-Cooper and Drewry advocated the sparing use of the dissent as opposed to its outright abolition. This would preserve the intellectual independence of each judge without hindering legal development by too many dissenting opinions*; Final Appeal*, n17, p89.

Total	Mean	.45
	N	246
	Std. Deviation	.887

Dissents can have value. They have been seen to elucidate the alternative perspectives on the case and thus assist the majority in forming a clear and comprehensive judgment.[89] Stronger decisions can be formed through sustained debate and the ability to identify and address possible issues or weaknesses with the majority's favoured route.[90] Dissents can also pacify an unsuccessful litigant or overruled lower court by knowing that at least one judge had sympathy with their argument or line of reasoning. Dissent could, therefore, be important in maintaining institutional relations with the lower courts. Again, however, there is a fine line between providing a level of contentment and increasing disappointment with the outcome of the appeal.[91]

Dissents also characterise the decision-making process of the final appeal court and bring it closer to the participatory democratic decision-making of Parliament. Alder believes that dissent has a deeper *political* role that stretches beyond mere disagreement with the outcome of the appeal. Dissent reflects, within the judicial setting, the competing societal values in a democracy which 'helps to offset the democratic deficit in the common law' and brings judicial decision-making closer to the participatory nature of legislative decision-making.[92] Paterson also views dissent in a participatory and open manner as it can initiate dialogue in the 'earliest and premeditated' sense, both by supporting a judge who seeks legal review of matters at a later stage[93] and who hopes to win over the majority in the instant case.[94] Kirby echoes these sentiments in that dissent is part of the 'indeterminate' and 'creative' nature of judicial decision-making in common law countries where 'today's dissent occasionally becomes tomorrow's orthodoxy.'[95] In this sense, a rising dissent rate in the Supreme Court may assist in balancing any increase in institutional power of the final appeal court, by ensuring that there is still evidence of active and participatory decision-making, where as many views as possible are taken account of, and where areas of concern can be highlighted for review at a later date.

[89]Blom-Cooper and Drewry, *Final Appeal*, n17, p87

[90]This is provided the majority decision is not 'exaggerated' when criticised, which can make the determination of the *ratio decedendi* a difficult task for lower courts; Blom-Cooper and Drewry, *Final Appeal*, n17, p87.

[91]Blom-Cooper and Drewry, *Final Appeal*, n17, p89

[92]J Alder, 'Dissents in Courts of Last Resort: Tragic Choices?'(2000) 20(2) OJLS 221, p223. See also: Lee, 'A Defence of Concurring Speeches', n80, 327

[93]Paterson provides the example of Lord Bingham's dissent in *Smith v Chief Constable of Sussex Police* [2008] UKHL 55, a case covered in the time period; *Final Judgment*, n1, p66-67

[94]Paterson *Final Judgment*, n1, p110-111

[95]M Kirby, 'Judicial Activism', Hamlyn Lectures (Sweet & Maxwell, 2004), p18

Concurrences and dissents are perhaps not equally likely to arise in all types of appeals. *Final Appeal* found that family law had a higher than average dissent rate and correspondingly patent and procedural cases had a lower dissent rate.[96] Table 44 shows that human rights cases had the highest average number of concurring opinions in the time period. This result was statistically significant.[97] The *post hoc* Bonferroni tests revealed statistically significant differences between Human Rights and Domestic, Constitutional and Public Law cases,[98] as well as between Human Rights and International cases.[99] These results confirm previous empirical findings that recorded a rise in concurring opinions from the pre to post HRA era of around 25% and 'a noticeable increase in human rights judgments that were unanimous by concurrence' which rose from 46% pre HRA to 61% thereafter.[100] They also lend support to the idea that all Justices wish to actively participate in any dialogue with the ECtHR by providing a judgment. Interestingly, Chapter 5 demonstrates that the lower courts are overturned less in the human rights field which could suggest that a greater number of concurrences, in such cases, assisted the lower court in reading precedent.

Table 44. Average Number of Concurring Opinions by Subject Matter

Case_Type	Mean	N	Std. Deviation
HR	2.93	43	1.831
DCAPL	1.93	111	1.772
LOPL	2.26	61	1.611
INT	1.48	31	1.568
Total	2.13	246	1.763

The clarity of precedent in the human rights field may also be assisted by the fact that although dissent rates are slightly higher in human rights and public law cases, they are still in line with the other categories of case. The only category that had a slightly lower average dissent rate was international cases. The numbers returned for average dissents were all less than one per case and were too small to allow for any further analysis. The figures, however, suggest that although human rights cases are often controversial and sensitive, they do not necessarily cause a greater level of disagreement in the final appeal court compared to other cases, and a relatively unanimous voice is presented to the ECtHR.

[96] Blom-Cooper and Drewry, *Final Appeal*, n17, p188.
[97] $F(3,210) = 3.75$, $p = 0.012$
[98] Mean difference = 0.92, $p = 0.026$
[99] Mean difference = 1.28, $p = 0.026$
[100] S Shah and T Poole, 'The Law Lords and Human Rights' (2011) 74(1) MLR 79, 87-88 and 90

Table 45. Average Number of Dissenting Opinions by Subject Matter

Case_Type	Mean	N	Std. Deviation
HR	.49	43	.960
DCAPL	.50	111	.923
LOPL	.44	61	.922
INT	.26	31	.514
Total	.45	246	.887

Concurring opinions may assist the reasoning process by extending the range of sources that are reviewed and cited to support the conclusions reached. Table 46 confirms that as concurring opinions increased the number of citations and references also increased. Statistically significant associations were present between the number of concurring opinions and the volume of academic citations, international comparative citations, domestic citations and ECtHR citations. These associations, alongside the increase that concurring opinions caused to the length of judgment, seen above, suggests that concurring opinions were not 'almost always' short in the time period.[101] Dissents also increased the length of judgment. However Table 47 demonstrates that the only statistically significant association for dissenting opinions in terms of additional citations was international comparative citations. There was also a modest association between the number of academic citations and the number of dissenting opinions.[102] Table 48 confirms these results, which records the relationship between the number of citations and unanimity. There was a rise in the mean number of international comparative, ECtHR and CJEU authorities when the final appeal court was not unanimous. However, only the difference in international citations was statistically significant.[103]

Table 46. Relationship between Concurring Opinions and Category of Citation

		No of concurring opinions provided in the case	No of times different academics are cited	No of times different International comparative caselaw is cited	No of times different European comparative caselaw is cited	No of times different domestic authorities are cited	No of different ECtHR authorities cited by division/ chamber	How many CJEU authorities are cited in the case?
No of	Pearson	1	.356**	.267**	.030	.211**	.316**	-.047

[101] Neuberger, 'No judgment- No Justice', n39, p12

[102] $r = 0.35$, $p < 0.0001$

[103] International citations $t(244) = 2.94$, $p = 0.004$. Strasbourg citations: $t(244) = 1.32$, $p = 0.19$, European citations $t(244) = .69$, $p = 0.49$; CJEU citations $t(244) = 0.56$, $p = 0.58$ were not statistically significant.

concurring opinions provided in the case	Correlation							
	Sig. (2-tailed)		.000	.000	.637	.001	.000	.461
	N	246	246	246	246	246	246	246
No of times different academics are cited	Pearson Correlation	.356**	1	.482**	.260**	.155*	.256**	-.040
	Sig. (2-tailed)	.000		.000	.000	.015	.000	.534
	N	246	246	246	246	246	246	246
No of times different International comparative caselaw is cited	Pearson Correlation	.267**	.482**	1	.095	.054	.075	-.084
	Sig. (2-tailed)	.000	.000		.137	.400	.242	.191
	N	246	246	246	246	246	246	246
No of times different European comparative caselaw is cited	Pearson Correlation	.030	.260**	.095	1	.030	.034	.000
	Sig. (2-tailed)	.637	.000	.137		.635	.591	.997
	N	246	246	246	246	246	246	246
No of times different domestic authorities are cited	Pearson Correlation	.211**	.155*	.054	.030	1	.142*	-.032
	Sig. (2-tailed)	.001	.015	.400	.635		.026	.615
	N	246	246	246	246	246	246	246
No of different Strasbourg authorities cited by division/ chamber	Pearson Correlation	.316**	.256**	.075	.034	.142*	1	.043
	Sig. (2-tailed)	.000	.000	.242	.591	.026		.505
	N	246	246	246	246	246	246	246
How many CJEU authorities are cited in the case?	Pearson Correlation	-.047	-.040	-.084	.000	-.032	.043	1
	Sig. (2-tailed)	.461	.534	.191	.997	.615	.505	

	N	246	246	246	246	246	246	246

**. Correlation is significant at the 0.01 level (2-tailed).

*. Correlation is significant at the 0.05 level (2-tailed).

Table 47. Relationship between Dissenting Opinions and Category of Citation

		No of dissenting opinions provided in the case	No of times different academics are cited	No of times different International comparative caselaw is cited	No of times different European comparative caselaw is cited	No of times different domestic authorities are cited	No of different Strasbourg authorities cited by division/ chamber	How many CJEU authorities are cited in the case?
No of dissenting opinions provided in the case	Pearson Correlation	1	.348**	.290**	-.045	.062	.105	-.024
	Sig. (2-tailed)		.000	.000	.481	.330	.101	.707
	N	246	246	246	246	246	246	246
No of times different academics are cited	Pearson Correlation	.348**	1	.482**	.260**	.155*	.256**	-.040
	Sig. (2-tailed)	.000		.000	.000	.015	.000	.534
	N	246	246	246	246	246	246	246
No of times different International comparative caselaw is cited	Pearson Correlation	.290**	.482**	1	.095	.054	.075	-.084
	Sig. (2-tailed)	.000	.000		.137	.400	.242	.191
	N	246	246	246	246	246	246	246
No of times different European comparative caselaw is cited	Pearson Correlation	-.045	.260**	.095	1	.030	.034	.000
	Sig. (2-tailed)	.481	.000	.137		.635	.591	.997
	N	246	246	246	246	246	246	246
No of times	Pearson	.062	.155*	.054	.030	1	.142*	-.032

different domestic authorities are cited	Correlation							
	Sig. (2-tailed)	.330	.015	.400	.635		.026	.615
	N	246	246	246	246	246	246	246
No of different Strasbourg authorities cited by division/ chamber	Pearson Correlation	.105	.256**	.075	.034	.142*	1	.043
	Sig. (2-tailed)	.101	.000	.242	.591	.026		.505
	N	246	246	246	246	246	246	246
How many CJEU authorities are cited in the case?	Pearson Correlation	-.024	-.040	-.084	.000	-.032	.043	1
	Sig. (2-tailed)	.707	.534	.191	.997	.615	.505	
	N	246	246	246	246	246	246	246

**. Correlation is significant at the 0.01 level (2-tailed).

*. Correlation is significant at the 0.05 level (2-tailed).

Table 48. Relationship between Unanimity of Final Appeal Court and Average Number of Citations

Unanimity		No of times different International comparative caselaw is cited	No of times different European comparative caselaw is cited	No of different Strasbourg authorities cited by division/ chamber	How many CJEU authorities are cited in the case?
Yes	Mean	1.43	.19	3.31	.91
	N	183	183	183	183
	Std. Deviation	3.410	1.472	6.955	3.203
No	Mean	3.30	.06	4.75	1.17
	N	63	63	63	63
	Std. Deviation	6.407	.246	8.810	3.577
Total	Mean	1.91	.16	3.68	.98
	N	246	246	246	246
	Std. Deviation	4.439	1.276	7.481	3.297

One final point of note is that Table 47 revealed significant associations between certain types of citation. There was a significant association between the number of academic citations and

international comparative, domestic comparative, European comparative and Strasbourg citations. Domestic comparative citations also had a significant association with Strasbourg citations.[104] The relationship between domestic comparative citations and Strasbourg citations may be owing to the need to have a consistent approach to the Convention in all UK legal jurisdictions. This is important to ensure that the minimum standards required by the Convention are met in each nation state and that the UK is not in breach of its international obligations. Furthermore, it ensures that the level of rights protection for UK citizens does not vary between each nation state. The results also suggest that at the point where comparative law features in the judicial reasoning process, academic citations also feature. Thus once 1 or 2 concurring opinions feature either comparative, Strasbourg or academic citations, the likelihood is that other types of citation will also be included to assist the reasoning process. How the strands of citation specifically interrelate would be an interesting subject for further qualitative analysis. Academic sources, for instance, could make international sources more accessible. Alternatively, academic and comparative citations could occur in cases where there was no clear precedent and the court sought guidance from other sources.

Panel Sizes and Split Votes

Table 49 and Figure 4 demonstrate that the move from the Appellate Committee to the Supreme Court has led to an increase in the number of 7 and 9 justice panels. Figure 5 illustrates how this pattern changed across the 4 years.

[104] $r = 0.14$, $p = 0.026$

Figure 4. Pie Charts of Panel Size by Court

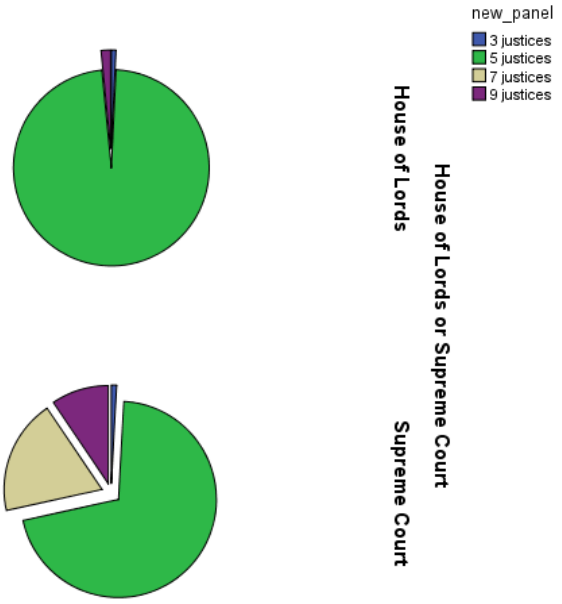
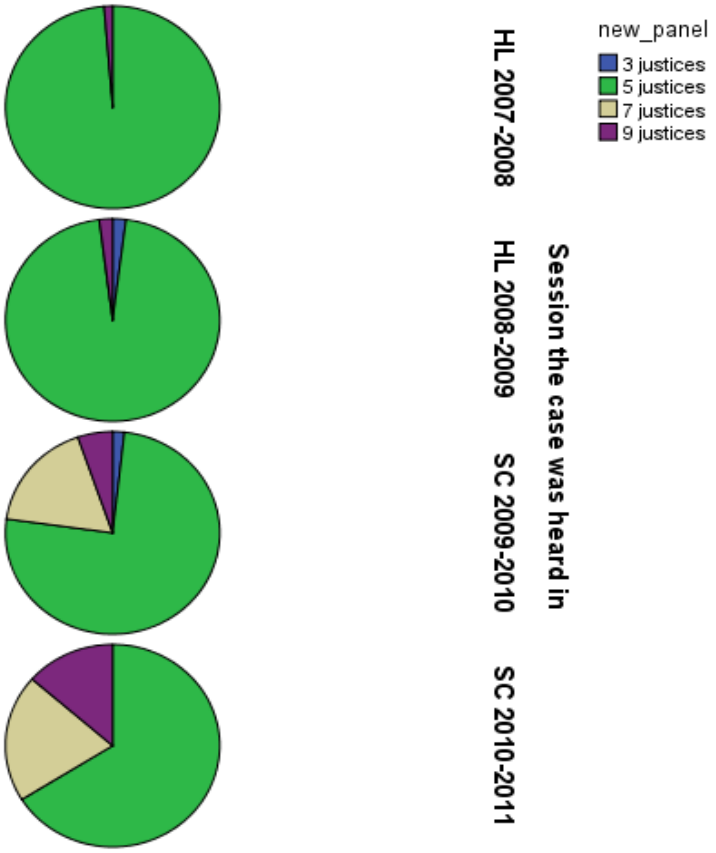


Table 49. Panel Size by Court

			House of Lords or Supreme Court		
			House of Lords	Supreme Court	Total
Panel	3 justices	Count	1	1	2
		% within new_panel	50.0%	50.0%	100.0%
	5 justices	Count	126	82	208
		% within new_panel	60.6%	39.4%	100.0%
	7 justices	Count	0	22	22
		% within new_panel	.0%	100.0%	100.0%
	9 justices	Count	2	11	13
		% within new_panel	15.4%	84.6%	100.0%
Total		Count	129	116	245
		% within new_panel	52.7%	47.3%	100.0%

Figure 5. Pie Charts of Panel Size by Session



In the Appellate Committee, it was exceptional for a case to be heard by more than 5 Law Lords in the time period.[105] The 5 judge panel served a practical purpose in a court with 12 permanent justices; it permitted 2 panels to be convened each week and 2 judges to be allowed time out of court to write, read and fulfil their other duties.[106] The 2003 Consultation Paper sought views on whether the membership of the court should be retained at 12 or whether a larger number would be of assistance to the new court. The advantage of a larger number of permanent justices would be the ability for more cases to be heard simultaneously. However, the then Government favoured the status quo on the basis that the larger the number of justices the more exposed the court is to criticisms based on panel selection and the potential that an alternative panel would have found differently.[107] The Labour Government dismissed the argument that judicial panel selection in the UK

[105]Paterson notes that between 2000-2009 the Appellate Committee only sat in larger panels on 13 occasions; *Final Judgment*, n1, p72. Blom Cooper and Drewry found only 2 cases during their period of study that did not convene a panel of 5 judges; *Final* Appeal, n17, p50
[106]*A Supreme Court for the United Kingdom*, n6, p16
[107]*A Supreme Court for the United Kingdom*, n6, p23-24

could still affect outcome[108] and felt that the risk was lower than in courts where appointments are made with an awareness of the judges' political beliefs.[109]

The Consultation Paper also considered whether the Supreme Court should sit *en banc* in a similar way to the US Supreme Court.[110] This proposal garnered support from practitioners,[111] academics,[112] and would have placed the UK in line with 'virtually all Supreme Courts the world over.'[113] Sitting *en banc* would have also have alleviated the criticism based on panel composition; however, the Government felt that it would have a detrimental effect on the Supreme Court in several other ways. The number of cases that could be heard each year would be limited as well as the simultaneous sitting of the Supreme Court and JCPC and the tailoring of panels to judicial specialism.[114] Other notable effects would include,

> … restricting the length of oral hearings, requiring more judicial assistants and restricting the current system for delivering concurring opinions; reducing the number of appeals that can be heard; and making the exercise of identifying the ratio of a decision more difficult ...[115]

The selective use of 7 and 9 Justice panels, primarily in cases that engage particularly sensitive issues appears to strike a balance between not compromising the overall efficiency of the court, yet adding weight and authority to a decision and immunising it from criticisms based on judicial panel selection.

The effect on the operational efficiency of the court of an increased panel size is confirmed by Table 50. The average length of the hearing went up by a full day where a 9 Justice Panel was convened in

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[108]Clayton nonetheless has suggested that the composition of the first panel in *R. v Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte (No.1)* [2000] 1 AC 61 HL had a dramatic effect on the course of the next two *Pinochet* appeals. He also refers to the conflicting cases of *R. v DPP ex p. Kebeline* [2000] 2 AC 326 HL (obiter) and *R v Lambert* [2001] UKHL 37, which reached opposing conclusions on the retrospective applicability of the HRA to criminal trials heard prior to the HRA coming into force. R Clayton, 'Decision-making in the Supreme Court: new approaches and new opportunities' [2009] PL 682, 682

[109]*A Supreme Court for the United Kingdom*, n6, p37

[110]*A Supreme Court for the United Kingdom*, n6, p37

[111] See Memorandum by Clifford Chance LLP dated 23rd April 2004 as part of the written evidence submitted to the House of Lords Select Committee on Constitutional Reform Bill Session 2003-2004 available <www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125we13.htm> accessed 25 February 2016

[112]Memorandum by Richard Cornes, Essex University, 28 April 2003 as part of the written evidence submitted to the House of Lords Select Committee on Constitutional Reform Bill Session 2003-2004, n111

[113]Clayton, 'Decision-making in the Supreme Court', n108, 682

[114]*A Supreme Court for the United Kingdom*, n6, p37

[115]Clayton, 'Decision-making in the Supreme Court', n108, 684

place of a 5 Justice panel. This was statistically significant.[116] The effects of a 7 Justice panel were not so marked, raising the length of the hearing by just under half a day. However, as discussed,[117] the effect on operational efficiency was dependent upon how many of the 7 Justices provided concurring opinions. As the 7 Justice panel was the more common deviation from the standard panel size this may explain why the increase in larger judicial panels in the Supreme Court did not have a marked effect on the overall average length of case. The negligible effect on overall length of case may also be owing to the net effect of the increase in composite/collective judgments in the Supreme Court. As seen above, these had, on average, a shorter hearing time than cases where multiple judgments were eventually produced.

Table 50. Panel Size and Average Length of Case

Panel Size	Mean	N	Std. Deviation
3 justices	1.50	2	.707
5 justices	1.98	208	.892
7 justices	2.32	22	.894
9 justices	3.08	13	1.188
Total	2.06	245	.941

An increased panel size also resulted in a linear increasing relationship in judgment gap, as can be seen from Table 51. These results were statistically significant.[118] The *post hoc* Bonferroni test revealed a significant difference between panels consisting of 5 and 9 Justices,[119] demonstrating again, that a significant impact on the efficiency of the court only occurred when a 9 Justice panel was convened.

Table 51. Panel Size and Average Judgment Gap

Panel Size	Mean	N	Std. Deviation	Minimum	Maximum	Std. Error of Mean
5	71.70	206	38.655	1	365	2.693
7	85.59	22	42.769	7	153	9.118
9	116.85	13	58.284	43	216	16.165
Total	75.41	241	41.479	1	365	2.672

[116]This difference was statistically significant ($F(3, 241) = 6.86$, $p < 0.0001$). The post hoc analysis revealed that the statistical difference was between the 5 and 9 Justice panels (Mean difference = 0.911, $p < 0.05$, 95%CI 0.29 to 1.54).
[117]See text at n14
[118]$F(2, 234) = 8.46$, $p < 0.0001$
[119]Mean difference: -47.02, $p < 0.05$, 95%CI -75.94 to -18.10

There was also a linear increasing, statistically significant,[120] relationship between panel size and the length of judgment produced (see Table 52). The *post hoc* Bonferroni test again demonstrated that the significance lay between 5 and 9 Justice panels.[121] This result is supported by Tables 53 and 54, which show that the average number of concurring and dissenting opinions increased in a linear, statistically significant,[122] manner alongside panel size.[123] The *post hoc* Bonferroni tests for concurring opinions revealed statistically significant differences between panel sizes of 5 and 9 justices[124] and 7 and 9 justices.[125] This result again demonstrates that 7 Justice panels did little to upset general efficiency considerations; however, the increase to a 9 Justice panel would do so in a significant manner. The average number of dissenting opinions was extremely low for all but the 9 justice panels and as such no further statistical analysis could be undertaken. Nevertheless, the average dissent rate increased when a 9 Justice panel was convened (between 1- 2 per case) from when a 7 Justice panel was convened (around 1 in every 2 cases).

Table 52. Panel Size and Average Length of Judgment

Panel Size	Mean	N	Std. Deviation	Minimum	Maximum
3	12.00	2	1.414	11	13
5	30.33	208	18.764	4	129
7	43.05	22	26.180	6	102
9	67.15	13	35.660	6	126
Total	33.28	245	22.385	4	129

Table 53. Panel Size and Average Number of Concurring Opinions

	N	Mean	Std. Deviation
3 justices	2	.00	.000
5 justices	208	2.00	1.516
7 justices	22	2.09	1.925
9 justices	13	4.77	2.891
Total	245	2.14	1.762

[120] $F(3,229) = 15.46$, $p < 0.0001$

[121] Mean difference = 36.82. $p < 0.05$

[122] $F(2, 241) = 12.67$, $p < 0.0001$

[123] This supports Paterson's reference to comparative studies, that suggest that concurrences and dissents are more common in larger panel sizes. See Paterson, *Final Judgment*, n1, p116-117

[124] Mean difference = -2.77, $p < 0.0001$

[125] Mean difference = -2.68, $p < 0.0001$.

Table 54. Panel Size and Average Number of Dissenting Opinions

	N	Mean	Std. Deviation
3 justices	2	.00	.000
5 justices	208	.38	.772
7 justices	22	.55	.912
9 justices	13	1.46	1.761
Total	245	.45	.889

Table 55 demonstrates that larger panel sizes did also issue single judgments on occasion. Of all the composite/collective styles of single judgment that were issued, 79% were 5 Justice panels, 13% were by 7 Justice panels and 5% were by 9 Justice panels. This meant that of all the 7 Justice panel decisions, 23% were single judgments and of all the 9 Justice panel decisions, 15% were single judgments. Therefore, whilst the vast majority of composite opinions are issued by 5 Justice panels and whilst the majority of 7 and 9 Justice panels will include multi-opinion judgments, it is not always the case that convening a 7 or 9 Justice Panel will result in the compromises on administrative efficiency outlined above. As the number of larger panels increases alongside the number of composite opinions in the Supreme Court, there may be a natural synergy of these two practices. This would strengthen the weight behind the decision without necessarily compromising on the operational efficiency of the court.

Table 55. Panel Size and Single Judgments

			Panel Size				
			3 justices	5 justices	7 justices	9 justices	Total
Was the case a single judgment case?	No	Count	0	157	17	11	185
		% within new_panel	.0%	75.5%	77.3%	84.6%	75.5%
	Yes-composite or collective judgment	Count	1	31	5	2	39
		% within new_panel	50.0%	14.9%	22.7%	15.4%	15.9%
	Yes- Single judgment with others only formally concurring	Count	1	20	0	0	21
		% within new_panel	50.0%	9.6%	.0%	.0%	8.6%
Total		Count	2	208	22	13	245
		% within new_panel	100.0%	100.0%	100.0%	100.0%	100.0%

One of the dangers of convening larger panels is the ability to achieve unanimity among a greater number of Justices. The close-call decisions with a 3:2 split and the effect that these decisions have on institutional relations with an overruled lower court or a party to the case could be even more acute were there to be a 5:4 or 4:3 split and would emphasise even further the close nature of such decisions.[126] In *Final Appeal,* Blom-Cooper and Drewry found that a 'high proportion of cases were not unanimous,'[127] and when they looked at decision splits they found exactly the same number of 3:2 dissents as 4:1 dissents.[128] The 3:2 split in particular was taken to show how 'finely balanced' judicial opinion can be, with 11% of cases, arising between 1952-68, having been decided in this way.[129] Blom-Cooper and Drewry used the number of such finely balanced cases to conclude that in such appeals it may be that the composition of the panel could have affected the outcome of the appeal and that, despite the administrative and staffing issues, there is a strong argument for the court sitting en banc.[130] The Supreme Court's preference to convene enlarged panels of judges, may go some way to addressing issues surrounding the composition of the panel, however it has the potential to exacerbate close splits even more than previously.

In the time period, the percentage of 4:1 dissents on at least one issue arising in the case was 12% in the Appellate Committee compared to just 9% in the Supreme Court. These percentages were not, however, consistent across the sessions with 2007-2008 returning a 9% rate of 4:1 dissents, 2008-2009 a 16% rate, 2009-2010 an 11% rate and 2010-2011, an 8% rate. Again with 3:2 dissents, the percentage of cases having at least one issue arising in the case with this split was 13% in the Appellate Committee compared to just 9% in the Supreme Court. This time, the percentages were consistent across the sessions with 2007-2008 returning a 13% rate of 3:2 dissents, 2008-2009 a 14% rate, 2009-2010 a 9% rate and 2010-2011 an 8% rate. The database returned very similar results for the Appellate Committee as in *Final Appeal*, with almost exactly the same number of 4:1 as 3:2 dissents and 12-13% of cases being decided in this way, compared to *Final Appeal's* 11%. The Supreme Court had exactly the same number of 3:2 as 4:1 splits however these were slightly rarer than in the Appellate Committee. There were no cases arising in the Appellate Committee during the time period that convened a 7 Justice panel. The Supreme Court, on the other hand, returned a 3% rate of at least one issue on the case being decided 6:1, a 2% rate of at least one issue being decided

[126]On this point, Clayton highlights that the statistical probability of a 5:4 or 4:3 split is a lot less than that of a 3:2 split; 'Decision-making in the Supreme Court', n108, 685

[127]22.5% of all appeals involved at least one dissent; 24.6% of English Civil Appeals, 20.6% of Scottish Appeals and 15.2% for English Appeals; Blom-Cooper and Drewry, *Final Appeal*, n17, p184

[128]Blom-Cooper and Drewry, *Final Appeal*, n17 p186

[129]Blom-Cooper and Drewry*, Final Appeal*, n17 p403

5:2 and a 2% rate of at least one issue being decided 4:3. Although there were 2 decisions in the Appellate Committee that convened 9 Justice panels both of these were unanimous on all issues. By contrast, in the Supreme Court, 3% of 9 Justice cases had a split of 8:1 on at least one issue, no cases recorded a 7:2 split, 3% of cases had a split of 6:3 on at least one issue and 2% of cases had a split of 5:4.

Taken as a whole, these small percentages do not reveal that larger panel sizes exacerbated the close nature of certain decisions. The narrower margins exist in the Supreme Court however larger panels appeared to be as successful as 5 Justice panels at garnering unanimity in the vast majority of cases. This is confirmed in Table 56 below which shows that 13% of 5 justice panels, 16% of 7 Justice panels and 8% of 9 Justice panels were divided.

Table 56. Relationship between Panel Size and Unanimity of Final Appeal Court

		new_panel				
		3 justices	5 justices	7 justices	9 justices	Total
What the result was in the lower court	Unanimous	1	172	16	11	200
	Divided	0	25	3	1	29
Total		1	197	19	12	229

Conclusion

Significant differences in the administrative efficiency and the judgment style of each court were evident in the transitional period. The Supreme Court had a significantly longer average judgment gap than the Appellate Committee and more frequently opted for a composite/collective style of judgment, which, by character, was significantly shorter in length than multi-opinion judgments. The Supreme Court also convened a larger judicial panel more regularly than the Appellate Committee. 9 Justice Panels were found to significantly affect the operational efficiency of the court in a way that 7 justice panels did not. These increased panel sizes also led to the emergence of 4:3, 6:3 and 5:4 splits in the time period which emphasise even more acutely the close nature of certain decisions. A slightly higher dissent rate was recorded in the Supreme Court, yet at the same time it recorded a smaller percentage of 3:2 and 4:1 splits than the Appellate Committee. Taken together, these results appear to suggest that the higher dissent rate in the Supreme Court was partially linked to the greater use of larger panels.

[130]Blom-Cooper and Drewry, *Final Appeal*, n17 p403

Aside from the differences recorded between the Appellate Committee and the Supreme Court, it was clear that human rights related appeals could also significantly affect the administrative efficiency of the court and judgment style used. In these appeals, the hearing length was found to be, on average, half a day longer than in cases involving other subject matters and it increased in a positive linear manner, alongside the volume of ECtHR citations. Furthermore, human rights judgments were on average 42 pages in length- significantly longer than judgments for other subject matters. The length of the judgment was also found to increase in line with the volume of ECtHR authorities cited. By contrast, the judgment gap in human rights appeals was shorter than in appeals dealing with other subject matters and reflects the results in Chapter 5, that following precedent reduced judgment gap. The results suggest that the involvement of either precedent or the influence of ECtHR guidance appeared to aid the reasoning process and thus make the judgment quicker to write. Human rights cases also significantly affected the judgment style, with a statistically significant higher number of concurring opinions in those cases. Given the relationship between concurring opinions and citation levels as well as the statistical relationship between ECtHR citations, academic citations and domestic comparative citations, it can also be concluded that human rights judgments appeared to draw upon a wide variety of different citations as part of the reasoning process.

Chapter 5 reveals that human rights cases decreased in the Supreme Court and this may partially explain the reduction in concurring opinions in that court, alongside what Paterson and Neuberger have revealed, above, is a deliberate policy to curtail concurrences. There has been a number of compelling arguments in favour of concurring opinions, outlined in this chapter, and the quantitative data has revealed the contribution they can make in terms of increased citation levels, references to academic resources and thus the overall reasoning process. Lord Neuberger, in his call for a reduction in concurrences and dissents acknowledged that 'decisions without reasons are certainly not justice; indeed they are scarcely decisions at all' and conceded that occasionally the 'benefit of judicial clarity is trumped by the need for judicial dialogue.'[131] It is perhaps no coincidence that concurring opinions were found to be at their highest in the time period in human rights cases and in Chapter 5 it is revealed that human rights cases were where lower courts were overruled the least and more successful in applying precedent. The relative success of the lower court may be owing to the additional reasoning and significantly higher numbers of academic, international, domestic comparative and ECtHR citations that concurring opinions were found to provide.

The significant findings in this chapter have enabled some suggestions to be made to assist in improving Supreme Court efficiency and in supporting institutional relations going forward. These

[131]Neuberger, 'No judgment-no Justice', n39, p1 and p11

suggestions relate to the practice of providing concurring opinions and of convening larger judicial panels. Firstly, there is a need to provide an agreed statement of facts and legal issues to avoid repetition and ensure that as far as possible, when concurring opinions are provided, they align by addressing themselves to an agreed set of issues. This would aid clarity and may assist in reducing the extra length that concurring opinions were found to add. Secondly, thought should be given to whether 1, 2 or 3 concurring opinions would be sufficient to enhance the reasoning of the judgment and if so limiting the number of concurrences accordingly. This would address the fact that 4 concurrences or above significantly affected the efficiency of the court, yet respond to the preliminary conclusion that the additional reasoning provided by concurring opinions appeared to support lower court reading of precedent. Thirdly, thought should be given to whether a 7 Justice panel would be sufficient to hear the issues in a case, as these panels had a significantly lesser impact on the administrative efficiency of the court than convening a 9 Justice panel. By adopting these suggestions, the court will retain the clear authoritative benefits of convening larger panels and the contribution to precedent that concurring opinions can add, whilst limiting the adverse effects on the administrative efficiency of the court.

Chapter 4; Relationship with the Branches of State

This chapter examines the institutional relationship that the final appeal court had with the executive and parliamentary branches of state in the time period. These relationships have an obviously political as well as legal dimension and differ in character from the relationship with the legal institutions reviewed in Chapters 5 and 6. The introduction outlined the theoretical constitutional infrastructure that describes the final appeal court's relationship with the other branches of state and the scope for the each power dynamic to be realigned. With Parliament this was seen in the possibility that the final appeal court may, in a sense, *share* sovereignty through the interpretation and enforcement of statutes and through the rising import of alternative constitutional principles that to some extent challenge sovereign power.[1] As regards the executive, this realignment was seen in the expansion of judicial review and the increasing justiciability of otherwise political issues in order to protect fundamental rights. Indeed, it was in the context of these latter areas that the judges predicted a more assertive court may begin to emerge.

The constitutional relationship between the executive and the judiciary is notoriously delicate. Lord Phillips regards the maintenance of 'a proper balance between executive and judicial decision-making' as 'perhaps the most important and most difficult role of the Supreme Court.'[2] The judges have to be particularly sensitive to the limits of their role, otherwise it could lead to Parliament curtailing powers of judicial review and reducing the constitutional role for the judiciary in the future.[3] The core of that role is to police the limits of the executive's constitutional functions and therefore a degree of tension in the judicial-executive relationship is to some extent 'entirely proper'[4] and 'the best guarantee the subject can have against the abuse of power.'[5] The extent of the tension will largely depend upon the context of the interaction, with threats to national security notoriously pushing each branch of state to the extremities of their legitimate constitutional role:

[1]See Knight and Allan's arguments; text at Chapter 1, n66
[2]Lord Phillips, 'Judicial Independence & Accountability: A View from the Supreme Court', (UCL Constitution Unit Lecture, 8 February 2011), p15 and p20 http://www.supremecourt.gov.uk/docs/speech_110208.pdf> accessed 25 February 2016
[3]Lord Phillips, 'Judicial Independence and Accountability', n2, p15
[4]Lord Bingham, 'The Rule of Law' (2007) CLJ 67, 79
[5]J Steyn, 'The Weakest and least dangerous Department of Government' [1997] PL 84, 93

> governments understandably go to the very limit of what they believe to be their lawful powers to protect the public, and the duty of the judges to require that they go no further must be performed if the rule of law is to be observed.[6]

The House of Lords Select Committee on the Constitution felt that severing the link between senior members of the judiciary and the executive under the CRA could exacerbate rather than relieve the strain between the two branches;

> … it would not be unreasonable to expect that such profound structural changes, with the judiciary assuming a more distinct identity, would lead to increased tensions between these two branches of state.[7]

This chapter reviews the empirical and observational data collated to comment on the nature and characteristics of the relationship between the executive and the judiciary in the time period. The quantitative data on the number of cases that involved the executive together with the success rate of the executive in each of the courts opens the chapter to establish the basics of the interaction during the time period. The empirical data revealed that judicial-executive relations were often three-dimensional owing to the influence of ECtHR. This three-dimensional context formed a framework to review the observational data to reveal the impact of the jurisprudence of ECtHR on judicial-executive relations in the Convention context before reviewing the extent to which the incorporation on the Convention also appeared to affect the orthodox judicial-executive relationship in the time period. The section closes with an examination of the extent to which the influence of the Convention appeared to also influence the character of judicial-executive relations.

The parliamentary section begins with a review of the strength of institutional communication in the time period, to discern whether weaknesses in statutory language resulted in a more constructive role for the court and the use of wider interpretative techniques. Judicial interpretative techniques vary in their level of respect for the principal text and their use feeds into the wider debate on shared sovereignty. The chapter then moves away from the specifics of language and examines institutional deference levels, both in terms of the subservience of the common law to statutory law and the respect for the law reforming role and position of Parliament. The effect that a threat to the rule of law or fundamental rights had on orthodox levels of deference was also reviewed to gauge whether the rule of law did in fact appear to be the 'ultimate controlling factor' in the constitution in

[6]Bingham, 'The Rule of Law', n4, 79
[7]House of Lords Select Committee on the Constitution, *Relations between the Executive, the Judiciary and Parliament* (HL 151), July 2007, para 31

the time period.[8] Finally, the section concludes with a review of how the influence of the Convention appeared to affect this institutional relationship in the time period.

The review of the court's institutional relations with Parliament uses the observational data collated, as the quantitative study was not specifically directed at judicial-parliamentary relations. The review of institutional relations with the executive uses a mixture of observational and quantitative data. The cases were recorded in the observational database for the insight that either the case itself or the judges provided to the institutional relational theme. Occasionally, the analysis was based on a relatively low number of cases and as such it was difficult to draw any definitive conclusions. In *Final Appeal*, it was warned that:

> One or two juristic swallows hardly make a public law summer. Although, when the swallow flies at such an exhalted height, it attracts attention beyond the intrinsic fact of flight not only in the lower courts but also among those professionally concerned with public administration.[9]

The observational data provided some indication of the institutional relationship with Parliament during the transitional period, including the influence of the Convention and thus was worthy of inclusion alongside the empirical analysis for a more complete picture of institutional relations in the time period.

Relationship with the Executive

Quantitative Data

Executive Involvement and Executive Success 2007-2011

Executive involvement in appeals by court and session are displayed in Tables 1 and 2 respectively. The overall percentage of cases involving the executive between the Appellate Committee and the Supreme Court remained stable at around 31.5%. Nevertheless, there was some fluctuation between sessions. In the final session of the Appellate Committee, the percentage of cases involving the executive fell by 50%. The figures remained at that level in the first session of the Supreme Court before recovering in the Supreme Court's second session. Thus, in the immediate transfer from the Appellate Committee to the Supreme Court, less than 20% of appeals involved the core executive. The fluctuation between sessions is reflective of the varied caseload in any given year. Nevertheless,

[8] *Jackson v HM Attorney General* [2005] UKHL 56 [107] (per Lord Hope).
[9] L Blom-Cooper and G Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon Press, 1972, p267

the fact that just under a third of both Appellate Committee and Supreme Court cases that arose in the time period involved the executive, allowed for a relatively equal comparison to be made between courts.

Table 1. Executive Involvement by Court

			House of Lords or Supreme Court		
			House of Lords	Supreme Court	Total
Exec_Involvement	No involvement	Count	87	76	163
		% within Exec_Involvement	53.4%	46.6%	100.0%
		% within House of Lords or Supreme Court	68.5%	68.5%	68.5%
		% of Total	36.6%	31.9%	68.5%
	Involvement	Count	40	35	75
		% within Exec_Involvement	53.3%	46.7%	100.0%
		% within House of Lords or Supreme Court	31.5%	31.5%	31.5%
		% of Total	16.8%	14.7%	31.5%
Total		Count	127	111	238
		% within Exec_Involvement	53.4%	46.6%	100.0%
		% within House of Lords or Supreme Court	100.0%	100.0%	100.0%
		% of Total	53.4%	46.6%	100.0%

Table 2. Executive Involvement by Session

			Session the case was heard in				
			HL 2007-2008	HL 2008-2009	SC 2009-2010	SC 2010-2011	Total
Exec_Involvement	No involvement	Count	51	36	40	36	163
		% within Exec_Involvement	31.3%	22.1%	24.5%	22.1%	100.0%
		% within Session the case was heard in	65.4%	73.5%	74.1%	63.2%	68.5%
		% of Total	21.4%	15.1%	16.8%	15.1%	68.5%
	Involvement	Count	27	13	14	21	75
		% within Exec_Involvement	36.0%	17.3%	18.7%	28.0%	100.0%
		% within Session the case was heard in	34.6%	26.5%	25.9%	36.8%	31.5%
		% of Total	11.3%	5.5%	5.9%	8.8%	31.5%
Total		Count	78	49	54	57	238
		% within Exec_Involvement	32.8%	20.6%	22.7%	23.9%	100.0%
		% within Session the case was heard in	100.0%	100.0%	100.0%	100.0%	100.0%
		% of Total	32.8%	20.6%	22.7%	23.9%	100.0%

Table 3. Executive Success by Court

			House of Lords	Supreme Court	Total
Whether the case involved a finding against the executive	Not Applicable	Count	87	76	163
		% within Whether the case involved a finding against the executive	53.4%	46.6%	100.0%
		% within House of Lords or Supreme Court	68.5%	68.5%	68.5%
	Yes	Count	16	21	37
		% within Whether the case involved a finding against the executive	43.2%	56.8%	100.0%
		% within House of Lords or Supreme Court	12.6%	18.9%	15.5%
	No	Count	24	14	38
		% within Whether the case involved a finding against the executive	63.2%	36.8%	100.0%
		% within House of Lords or Supreme Court	18.9%	12.6%	16.0%
Total		Count	127	111	238
		% within Whether the case involved a finding against the executive	53.4%	46.6%	100.0%
		% within House of Lords or Supreme Court	100.0%	100.0%	100.0%

The empirical data collected demonstrates that across the 4 years there were an almost equal number of findings for the executive compared to findings against (37 and 38 cases respectively). Taking cases that involved the executive, 60% were successful in the Appellate Committee whereas only 40% were successful in the Supreme Court.[10] The lower success rate in the Supreme Court goes

[10]Paterson also found a drop in the success rate of central government from 57% in the Appellate Committee between 2006-2009 to 54% in the early years of the Supreme Court; *Final Judgment, The Last Law Lords and The Supreme Court* (Hart Publishing, 2013), p289. The differences between the statistics are likely to lie in Paterson's slightly different time period and what was coded as 'core Executive.' For instance, the Crown in criminal appeals was not counted as core executive for the purposes of this study.

against Lord Bingham's previous observation that the executive, '… is usually successful, but not invariably so.'[11] It also counters quantitative research that found central government to be a high status repeat litigator that could draw upon extensive resources and was more likely to succeed in appeals.[12] Instead, the results appear to lend support to the suspicion that a newly independent Supreme Court may feel more able to challenge the policies of the executive than the Appellate Committee. Given the small time frame, these statistics have to be treated with a degree of caution. A larger study, capable of rising above annual fluctuations in caseload, would be needed before the Supreme Court could conclusively be regarded as more assertive in its approach towards the executive.

It should also be noted that a successful result for the executive did not necessarily mean that there was less 'tension' between the judiciary and the executive as the quantitative data was not sensitive enough to measure this. In *Odelola v Secretary of State for the Home Department*,[13] for instance, the executive was empirically successful after it was found that decisions authorising leave to enter or to remain had to be made in accordance with the rules in force at the time of the decision rather than at the time of the application. Nevertheless, the Law Lords still advised the Government on aspects of the scheme which they did not think were fair or proportionate, such as the level of fees that had been paid by the applicant given the rule change and the fact that the applicant's request was bound to fail.[14] Thus executive policy could still be challenged in cases that ultimately upheld the executive.

Administrative Efficiency and Executive Involvement

Executive involvement had little effect on the time it took to hear an appeal in the time period. Table 4 demonstrates that cases that involved the executive only had a slightly longer hearing time than cases that did not and this was not significant.[15] Table 5 also demonstrates that there was next to no difference in length of hearing depending on the success of the executive.

Table 4. Executive Involvement and Average Length of Case

Exec_Involvement	Mean	N	Std. Deviation
No involvement	1.99	163	.816
Involvement	2.16	75	1.103
Total	2.04	238	.918

[11] Bingham, 'The Rule of Law', n6, 78
[12] C Hanretty, 'Have and Have-nots before the Law Lords' (2014) 62(3) Pol.Stud 686, 689 and 695.
[13] [2009] UKHL 25
[14] *Odelola,* n13 [2] (per Lord Hope), [10] (per Lord Scott) and [40] (per Lord Brown) respectively.
[15] $t(236) = 1.35$, $p = 0.18$

Table 5. Executive Success and Average Length of Case

Exec_Finding	Mean	N	Std. Deviation
Yes	2.14	37	.976
No	2.18	38	1.227
Total	2.16	75	1.103

Table 6 demonstrates that those cases involving the executive took, on average, slightly longer than those not involving the executive to produce a judgment, however this was not statistically significant.[16] Table 7 also demonstrates that where there was a finding against the executive, this increased the average judgment gap further still, but again this was not statistically significant.[17] The lack of significance may be attributable to the high standard deviation figure for 'executive involvement', which was more than twice the level of the mean for 'findings against the executive'. This suggests that there was a lot of variability in the length of the judgment gap for individual appeals and a study covering a larger time period would be required to confirm whether executive involvement and findings against the executive did genuinely extend the length of time it took to hand down judgment.

Table 6. Executive Involvement and Average Judgment Gap

Exec_Involvement	Mean	N	Std. Deviation
No involvement	80.40	162	82.314
Involvement	92.45	75	149.518
Total	84.21	237	107.999

Table 7. Executive Success and Average Judgment Gap

Exec_Finding	Mean	N	Std. Deviation
Yes	111.57	37	209.800
No	73.84	38	34.115
Total	92.45	75	149.518

The average length of judgment was only 2 pages longer when the executive was involved (see Table 8) and there was next to no difference in judgment length depending on whether the executive was successful or not (See Table 9). Nevertheless, chapter 3 demonstrated that 7 of the 11 outlier appeals, that had a judgment length of 83 pages or more, involved government departments or

[16] $t(236)=0.8$, $p=0.43$
[17] $t(74) = 1.09$, $p = 0.28$

ministers.[18] 4 of these outliers involved consideration of the Convention and 2 had among the highest number of Strasbourg citations recorded in the time period.[19] As such, the average length of case involving the executive was on a par with those not involving the executive, however occasionally an appeal arose that involved a particularly potent combination of issues and had the capacity to grossly inflate the number of pages in the judgment.

Table 8. Executive Involvement and Average Length of Judgment

Exec. Involvement	Mean	N	Std. Deviation	Minimum	Maximum
No involvement	31.84	163	19.998	4	129
Involvement	33.27	75	21.254	6	125
Total	32.29	238	20.368	4	129

Table 9. Executive Success and Average Length of Judgment

Exec_Finding	Mean	N	Std. Deviation	Minimum	Maximum
Yes	32.95	37	21.828	7	125
No	33.58	38	20.969	6	92
Total	33.27	75	21.254	6	125

Overall, executive involvement only had a mild impact on final appeal court efficiency and none of the increases recorded in the time period were statistically significant. There was a 6% increase in findings against the executive in the Supreme Court as compared to the Appellate Committee, however the statistics suggest that the only effect this would have, from a efficiency perspective, is a slight increase in the time it takes to hand down judgment. Any increase in the number of executive-related appeals in the future would, based on the results in this study, appear to have a negligible impact upon the Supreme Court's overall efficiency unless those appeals also involved a Convention matter. The involvement of Strasbourg jurisprudence had the capacity, in the time period, to affect the administrative efficiency of the court, as established more generally in Chapter 5 and as evinced by the length of the 'outlier' judgments involving the executive in this chapter. Indeed, the large

[18] *HM Treasury v Mohammed Jaber Ahmed* [2010] UKSC 2; *R (on the app of Adams) v S of S for Justice; App by Eamonn MacDermott for Judicial Review (NI)* [2011] UKSC 18; *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61; *R (on the application of Smith) v Secretary of State for Defence* [2010] UKSC 29; *RB(Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; *Total Network SL v HMRC* [2008] UKHL 19; *Walumba Lumba 1 and 2 and Kadian Mighty v Secretary of the State for the Home Department* [2011] UKSC 12

[19] *R (Smith)*, n18 cited 49 different Strasbourg authorities and *RB (Algeria)*, n18 cited 25 Strasbourg authorities.

amount of overlap in cases that reviewed executive decision-making and Convention matters meant that judicial-executive relations often had a three- dimensional perspective in the time period.

Judgment Style and Executive Involvement

The quantitative data explored the extent to which involvement of the executive influenced the judgment style, outlined in Chapter 3. For instance, it was slightly harder to return a unanimous verdict where the executive was involved in both the lower courts and the final appeal court. Table 10 demonstrates that, in the lower courts, just under 81% of cases involving the executive returned a unanimous decision, which is slightly less than the 90% unanimity rate in non-executive cases. Findings against the executive were 86% unanimous and only 76% unanimous when the executive was upheld. The lower court therefore tended to be slightly stronger in its convictions when going *against* the executive than in decisions to *uphold* the executive. This may suggest a stronger push to achieve unanimity in controversial findings against the executive. Table 11 compares these results with the unanimity rate in the final appeal court in decisions involving the executive. In executive cases, the final appeal court was only unanimous on 68% of occasions compared to a 77% unanimity rate in non-executive cases. In those cases that found against the executive, the unanimity rate was 65% and in those cases that upheld the executive, the unanimity rate was 71%. These results confirm that cases involving the executive were harder to return a unanimous verdict, however the final appeal court differed from the lower court in that it was more likely to be unanimous in cases that *upheld* the executive than those that found *against* the executive. The difficulty in garnering unanimity in such appeals may do little to relieve the apparent 'tension' that exists between the two branches. In particular, it is perhaps desirable that a strong unanimous judicial panel executes a finding against the executive.

Table 10. Executive Involvement and Unanimity of Final Appeal Court

		What the result was in the lower court		
		Unanimous	Divided	Total
Exec_Involvement	No involvement	138	15	153
	Involvement	59	14	73
Total		197	29	226

Table 11. Executive Success and Unanimity of Final Appeal Court

		Whether the case involved a finding against the executive			
		Not Applicable	Yes	No	Total
SCHL_Unanimity	SC/HL Divided	36	13	11	60
	SC/HL Unanimous	127	24	27	178
Total		163	37	38	238

One way to ensure a clear unanimous judgment in cases that involve the executive would be to issue a single judgment. Table 12 demonstrates that 21% of all single judgments issued involved the executive but only 16% of all decisions that involved the executive were single judgments. As such, it was still relatively rare for single judgments to be used in preference to multi-opinion judgments in executive cases. The statistics reveal a general trend towards increasing the volume of single judgments that are issued by the Supreme Court compared to the Appellate Committee and as cases involving the executive make up just over a fifth of all single judgments, it could be that as one increases the other will organically increase alongside it.

Table 12. Executive Success and Single Judgments (dichotomised)

		Whether the case involved a finding against the executive			
		Not Applicable	Yes	No	Total
SINGLE	No	118	32	31	181
	Yes	45	5	7	57
Total		163	37	38	238

The statistics on concurring and dissenting opinions in cases involving the executive, however, suggest that it would take a significant change in mind-set for the Justices to move towards more single judgments in such cases. These cases tended to have higher numbers of both dissenting and concurring opinions, with the highest average for each being in cases that found against the executive (see Table 13). These results were not statistically significant[20] however tend to suggest that the Justices regarded it as important to provide their own individual opinion in such cases, especially in cases that found against the executive.

[20] $F(2,235) = 1.22$, $p = 0.30$, and $F(2,235) = 0.86$, $p = 0.43$, respectively.

Table 13. Executive Success and Average Number of Concurring and Dissenting Opinions

Whether the case involved a finding against the executive		No of concurring opinions provided in the case	No of dissenting opinions provided in the case
Not Applicable	Mean	1.99	.39
	N	163	163
	Std. Deviation	1.642	.835
Yes	Mean	2.41	.59
	N	37	37
	Std. Deviation	1.950	1.040
No	Mean	2.32	.47
	N	38	38
	Std. Deviation	1.694	.830
Total	Mean	2.11	.44
	N	238	238
	Std. Deviation	1.703	.868

Another method of adding weight and authority to decisions involving the executive would be to increase the panel size that hears such cases. In cases that involved the executive, Table 14 demonstrates that 80% were heard by 5 Justice panels, 12% were heard by 7 Justice panels and 7% were heard by 9 Justice panels. That compares to cases not involving the executive where 88% were 5 justice panels, 7% were 7 Justice panels and 4% were 9 Justice panels. These figures suggest that although the vast majority of cases that involved the executive were still heard by 5 Justice panels, there was a modestly increased tendency, in such cases, to convene either a 7 or 9 justice panel. An increased panel size, in such cases, could be justified on the basis of the public importance of the issues at hand. Out of the 9 cases that involved the executive and convened a 7 Justice panel, 6 cases (67%) found against the executive and 3 (33%) upheld the executive. Out of the 5 cases that involved the executive and convened a 9 Justice panel, 3 cases (60%) found against the executive and 2 cases (40%) upheld the executive. These figures suggest that larger panel sizes had an increased tendency to find *against* the executive and may be one of the reasons that there was a slightly higher rate of findings against the executive in the Supreme Court.

Larger panel sizes can bring extra weight to the decision, especially if the panel is unanimous in its view. Nevertheless, the statistics reveal that larger panels were often divided. Of the 9 occasions involving the executive where a 7 Justice panel was convened, there was division on 3 occasions and

in all 3, the finding was against the executive. Of the 5 occasions when a 9 Justice panel was convened, there was again division on 3 occasions, twice when the finding was against the executive and once where the finding was for the executive. As seen in chapter 3, division across a larger panel is perhaps even more dissatisfying to the litigant than in a standard 5 justice panel and this appeared to happen more often in findings *against* the executive. An increased use of larger panels in cases that involve the executive- which then divide in cases that find against the executive- could add another dimension to existing judicial-executive tensions.

Table 14. Executive Involvement and Panel Size

			new_panel				
			3 justices	5 justices	7 justices	9 justices	Total
Exec_Involvement	No involvement	Count	1	144	12	6	163
		% within Exec_Involvement	.6%	88.3%	7.4%	3.7%	100.0%
		% within new_panel	50.0%	70.9%	57.1%	54.5%	68.8%
		% of Total	.4%	60.8%	5.1%	2.5%	68.8%
	Involvement	Count	1	59	9	5	74
		% within Exec_Involvement	1.4%	79.7%	12.2%	6.8%	100.0%
		% within new_panel	50.0%	29.1%	42.9%	45.5%	31.2%
		% of Total	.4%	24.9%	3.8%	2.1%	31.2%
Total		Count	2	203	21	11	237
		% within Exec_Involvement	.8%	85.7%	8.9%	4.6%	100.0%
		% within new_panel	100.0%	100.0%	100.0%	100.0%	100.0%
		% of Total	.8%	85.7%	8.9%	4.6%	100.0%

Three Dimensional Institutional Relationship

The institutional relational dynamic between the judiciary and the executive has to accommodate a third institution whenever a Convention article is engaged. Within the Convention context, the

impact of the institutional influence of the ECtHR on this relationship was especially evident in the time period in the decision-making balance struck between the judiciary and the executive, particularly where A5 and A6 of the Convention were engaged and secondly in the proportionality-based review of executive decision-making, particularly where A8 of the Convention was engaged. Before looking in more detail at the interactions between the three institutions, the chapter reviews the quantitative data to contextualise the frequency that the 'three-way institutional dynamic' arose in the time period, whether the ECtHR line was followed in such cases and whether the executive was more likely to be overruled in this context. In other words, it assesses the extent to which executive policy was challenged by the jurisprudence of the ECtHR.

Quantitative Data; the Final Appeal Court, the Executive and the ECtHR

Table 15. Executive Involvement and Following the Strasbourg Line

		Executive involvement		
		No	Yes	Total
Does the case follow Strasbourg line of authority?	Not applicable	124	42	166
	Yes	31	27	58
	No	2	1	3
	Justices unsure of what Strasbourg line is	6	5	11
Total		163	75	238

Table 15 demonstrates that of all the cases where the executive was a party, 44% related to a Convention matter. Thus whereas it was more common for the executive to be party to a case that did not involve the Convention, there was a substantial amount of overlap between cases that involved the executive and a Convention matter. In such cases the institutional relational dynamic was three-dimensional involving the court, the executive and also the jurisprudence of the ECtHR. Table 15 demonstrates that of the 44% of cases involving the executive and a Convention matter, 82% of cases followed the Strasbourg line of authority, in 15% of cases the ECtHR line was unclear, and 3% of cases rejected the ECtHR line. The Appellate Committee has shown itself to be virtually bound to follow a decision of the Grand Chamber[21] and only three cases rejected the ECtHR line in

[21] *Secretary of State for the Home Department v AF* [2009] UKHL 28

the time period, one of which involved the executive.[22] The final appeal court was therefore no more likely to reject the ECtHR line of authority when the executive was involved in the case. The statistics confirm that the final appeal court takes very seriously the need to follow clear and constant ECtHR authority and in the vast majority of cases it will be logical for it to do so, unless there are special reasons that suggest otherwise.[23] This point is returned to in Chapter 6 below.

Where the ECtHR jurisprudence was not clear and constant, there was a very real prospect that the ECtHR could disagree with the court's decision. These cases were at the start of the dialogue process and it may well be some time before the final resolution of the issue at hand. Table 15 reveals that just less than 50% of cases where the Justices were unsure of the ECtHR line involved the executive. Given the extent of the three-way institutional dynamic, relations between the executive and the final appeal court depend upon the relationship between the final appeal court and the ECtHR operating smoothly and for cases where the ECtHR line of authority is unclear to be minimised. A degree of uncertainty will always be present, given the generic nature of the ECtHR's pronouncements on the requirements of the Convention, the need to proportionately assess the extent of the rights interference and owing to the margin of appreciation that is afforded to states in striking that balance.[24] Furthermore, the ECtHR is not bound by its own decisions and can always depart from a previous expressed line of reasoning. The absence of the need for Strasbourg to rationalise its decisions with the past occasionally caused the court difficulty in trying to reconcile two different strands of ECtHR jurisprudence.[25] The degree of flexibility built into ECtHR jurisprudence has many benefits however it can also result in some uncertainty over the correct approach, which- given the three-dimensional institutional relationship- could adversely affect judicial-executive relations.

[22] *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15. *Animal Defenders* was coded as 'not following Strasbourg jurisprudence.' The Appellate Committee did not suggest that Strasbourg would find the UK in breach; however, the court appeared to distinguish *VgT Verein gegen Tierfabriken v Switzerland (24699/94)* (2002) 34 EHRR 4, which had very similar facts, on narrow grounds. *Animal Defenders* sat closer to *VGT* (where a breach was found) than *Murphy v Ireland (44179/98)* (2004) 38 EHRR 13 which involved religious speech and no breach was found. Furthermore, a s19(1)(b) HRA 1998 declaration had been made by the minister introducing the Communications Act 2003, demonstrating that the executive was also not certain as to the statute's compatibility with the Convention.

[23] This was the approach advocated by Lord Bingham in *R v Special Adjudicator ex p Ullah* [2004] 2 AC 323 [20]

[24] *Handyside v UK* (1976) 1 EHRR 737 [48 -49]

[25] See *R (on the application of Wellington) v Secretary of State for the Home Department* [2008] UKHL 72 and *R v Briggs-Price* [2009] UKHL 19 by way of example.

Table 16. Executive Success and Following the Strasbourg Line

		Whether the case involved a finding against the executive			
		Not Applicable	Yes	No	Total
Does the case follow Strasbourg line of authority?	Not applicable	124	23	19	166
	Yes	31	12	15	58
	No	2	0	1	3
	Justices unsure of what Strasbourg line is	6	2	3	11
Total		163	37	38	238

Table 16 refines the results of Table 15 to establish whether the cases that followed or declined to follow ECtHR authority tended to more commonly find for or against the executive. The *Animal Defenders* case[26] rejected the ECtHR line and in doing so upheld the executive. Nevertheless, the judicial dicta in that case revealed that the result was actually owing to a strong statement of *parliamentary* supremacy in balancing democratic values rather than *executive* supremacy and reinforced the fact that the supreme institutional power, even in the Convention context, was still Parliament. As such, the case is discussed in more detail below when assessing the influence of the Convention on the institutional relationship with Parliament.

In the cases where the Justices were unsure of the ECtHR line of authority, there were an almost equal number of cases that found for as found against the executive. As such, it cannot be said with any certainty, based on the small numbers of cases involved, that the final appeal court interprets conflicting or unclear ECtHR authorities so as to either defeat or uphold the executive. Again, in cases where the ECtHR line was followed, there was a marginally higher rate of upholding the executive (55%) compared to a finding against the executive (45%). This was the opposite way around when the Convention was not involved, where there was a marginally higher rate of finding against the executive (55%) compared to finding for the executive (45%). As numerically, these percentages are only based on a difference of three or four cases, it is not enough to draw any firm conclusions. Nevertheless, the results from the time period appear to call into question the accusation that ECtHR jurisprudence more often than not *interferes* with executive or state policy. Instead, the court followed the clear jurisprudence of the ECtHR in the vast majority of cases and executive- or state- policy appeared to adhere to the requirements of the Convention, or rather how the final appeal court interpreted the requirements of the Convention, in the majority of cases.

[26] *Animal Defenders,* n22

To summarise, in the time period, a minority of cases (44%) were found to involve the executive and a Convention related matter. 82% of those cases followed the Strasbourg line of authority and majority of those cases (55%) upheld the executive line. Should the proportion of Convention decisions rise, even marginally, in the coming years it may be that a majority of executive decisions are decided on the basis of Strasbourg jurisprudence. This may serve to reinforce claims that domestic sovereignty is regularly being challenged by the ECtHR and that Parliament should have the final authority over whether a decision of the ECtHR is adopted (see also Chapter 5).[27] Nevertheless, the time period demonstrated that the influence of Strasbourg had a positive effect on the success of the executive in the majority of cases and this should not be overshadowed by the well-publicised instances where the jurisprudence of the ECtHR has required Parliament or the executive to rethink matters.[28]

The decision-making balance under the Convention

The three dimensional institutional relationship, the loyalty of the court to ECtHR jurisprudence and the relative success of the executive in the Convention context was all evident in the time period when it came to determining the institutional decision-making balance and the decision-making procedures required by the Convention.

Executive success was in part owing to the judicial ability to isolate deficiencies in executive decision-making or procedure domestically from the minimum standards of decision-making required by the Convention. This was evident in the context of A5 ECHR which prescribes the appropriate state institution to make a decision affecting an individual's liberty. A5(4) epitomises the decision-making balance that is to be struck between executive and the court;

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

A5(4) was raised in *R (on the application of Black) v Secretary of State for Justice,*[29] where the Law Lords were presented with an issue of justiciability over prisoner release dates and had to determine where the proper division of power lay between the courts and the executive. The Law Lords (Lord

[27]See 'Tories plan to withdraw the UK from the European Convention on Human Rights', The Guardian, 3rd October 2014 <www.theguardian.com/politics/2014/oct/03/tories-plan-uk-withdrawal-european-convention-on-human-rights> last accessed 26th October 2015

[28]See *Hirst v UK (No 2)* (2006) 42 EHRR 41, in relation to prisoner voting rights and *R (on the application of F) and Thompson v Secretary of State for the Home Department* [2010] UKSC 17 in relation to the incompatibility of notification requirements following a sexual offender's release from prison.

[29][2009] UKHL 1

Phillips dissenting) upheld the executive argument that once a prisoner's parole eligibility date had passed in a determinate sentence, A5(4) ECHR did not require a court hearing to determine the lawfulness of the continued detention. ECtHR jurisprudence indicated that the requirements of A5(4) were satisfied for determinate sentences when the initial court imposed the sentence and that early release was an administrative action that could be carried out by the executive. Although, a declaration of incompatibility was avoided, it did not prevent the Law Lords from criticising the executive's role domestically. Lord Rodger found,

> it hard to understand why [the Secretary of State] should wish to cling tenaciously to this last vestige of his power to determine when prisoners should be released, since she accepts that there can be no legitimate political input into the decision.[30]

Lord Carswell also suggested that the executive review the power given that, 'there appears to be no good reason for its retention … '.[31] Therefore, although the executive's sentencing powers fulfilled the institutional decision-making requirements of ECtHR and the executive was successful, that success was still accompanied by the Law Lords' suggesting a change to the institutional decision-making process.

Another A5(4) challenge, this time relating to indeterminate sentences, came in *Secretary of State for Justice v James*.[32] Again, Lord Hope found no immediate breach of A5(4) where a parole board had been denied the information it needed to review the continued detention of a prisoner and their safety for release. The continued detention of the prisoner would only violate A5(4) to the extent that 'the system breaks down entirely' i.e. 'the Parole Board is denied the information that it needs for such a long period that continued detention has become arbitrary'.[33] Again, a distinction was made in the case between the Secretary of State being in clear breach of their domestic public law duty and the continued detention of prisoners being unlawful under A5(4) ECHR. Lord Brown had sympathy with the appellant's argument but read A5(4) as merely a procedural requirement to decide matters quickly rather than requiring any substantive guarantees in terms of provision of the material required to make the decision.[34] This was in accordance with the current institutional guidance of the ECtHR[35] and although a wider reading of A5(4) could occur in the future, this was regarded as a matter for the ECtHR and not the domestic court.[36] The case demonstrated that

[30] *Black*, n29 [50]
[31] *Black,* n29 [58]
[32] [2009] UKHL 22
[33] *James,* n32 [21]
[34] *James,* n32 [59]
[35] As approved by *R v Special Adjudicator ex p Ullah* [2004] 2 AC 323
[36] *James,* n32 [62]

domestic issues, such as a failing in public law duty, were a separate consideration to whether the executive had satisfied the institutional decision-making requirements of the Convention. Furthermore, the final appeal court was only prepared to hold the executive to the decision-making standard advocated in the ECtHR jurisprudence *at that time* and no more.[37]

Despite the court only following the *minimum* standards imposed by clear and constant ECtHR jurisprudence, the court was faithful to the requirements of the HRA and the understanding that it required the court to vindicate Convention rights in domestic law. Executive success or otherwise would follow from that constitutional role. This was evident in *Secretary of State for the Home Department v AF*.[38] The Prevention of Terrorism Act 2005 ('PTA') control order regime was a legislative response to the *Belmarsh*[39] decision that declared s23 of the Antiterrorism, Crime and Security Act 2001 to be incompatible with A5 and A14 ECHR. The Law Lords were therefore aware of the 'acute tension' in *AF* caused by the Convention challenge to the PTA control order regime.[40] The 9 judge panel found against the executive, ruling that under A6 ECHR an individual subject to a non-derogating control order needed to be informed sufficiently of the allegations against them, in open material, so that they could respond to those allegations. The court felt bound to follow the Grand Chamber decision of *A v UK*.[41] Lord Hoffmann's position confirmed that the 'clear and constant' jurisprudence of the ECtHR- particularly a Grand Chamber decision- would be compelling in informing the court of how to vindicate Convention rights in domestic law. He believed *A* to have been wrongly decided and expressed his 'considerable regret' at having to follow it, given that the UK control order regime would likely be 'destroyed'.[42] Therefore, although *James* indicated that the court would not go *beyond* the minimum requirements of the Convention in prescribing executive decision-making, *AF* demonstrated that the court would also not go *below* the clear requirements of the Convention.

The Supreme Court appeared to lighten the obligation on the executive in closed material proceedings by curtailing the obligation in *AF* to its specific context in *Home Office v Tariq*.[43] By a majority of 8-1, the court found for the executive and distinguished the situation where closed material was used in answer to a civil claim for discrimination to that in *AF* where an individual's

[37]The 'mirroring' of Convention requirements rather than using the HRA to establish a domestic human rights jurisprudence that can go further than the Convention has been criticised. See J Lewis, 'The European Ceiling on Human Rights' [2007] PL 720
[38]*AF,* n21
[39]*A v Secretary of State for the Home Department* [2004] UKHL 56
[40]*AF,* n21 [77] (per Lord Hope)
[41][2009] 49 EHRR 29
[42]*AF,* n21 [70]
[43][2011] UKSC 35

liberty is at risk by some kind of detention. Nevertheless, this outcome followed a line of cases from the ECtHR, the most recent being *Kennedy v UK*.[44] It cannot, therefore, be concluded that the strong line taken by the Appellate Committee in *AF* was weakened by the line taken by the Supreme Court in *Tariq* as in both instances the judges were faithfully following the requirements of the ECtHR's jurisprudence. Again, the procedural decision-making process was effectively determined by the Strasbourg jurisprudence and the finding for or against the executive followed from this.

These select cases support the empirical data that the court would follow the ECtHR in nearly all cases and that the executive was usually successful when it did so. The cases also show that executive success may have been attributable to the judicial tendency to isolate domestic failings from the standard required by the Convention and to not hold the executive to a standard greater than that required by the jurisprudence of the ECtHR. Nevertheless, it was clear that the court was faithful first and foremost to the requirements of the HRA and the understanding that clear and constant ECtHR jurisprudence should be implemented in order to vindicate Convention rights in domestic law. The ECtHR had a de facto institutional role in prescribing the domestic institutional decision-making processes and procedures in the time period and the three-way institutional relational dynamic was very apparent in this context.

Proportionality Review under the Convention

The three-way institutional relational dynamic was also identifiable in the proportionality-based review undertaken during the period. Proportionality review has fundamentally altered the type of review of executive decision-making that the courts can legitimately undertake. Nevertheless, relative executive success was also seen in the tailoring of the review depending on the Convention article under consideration and the level of deference that should be afforded to the executive owing to the context. This variable standard of proportionality-based review is often overlooked in academic writing.[45]

The Appellate Committee made clear that the intensity of the review in Convention cases depended upon the article under consideration and whether the article accommodates different levels of review. In *R (on the application of RJM) v Secretary of State for Work and Pensions*,[46] the court looked at the 'rationale' behind the executive's approach to consider whether the 'discrimination'

[44](Application No 26839/05) (unreported) 18 May 2010. See Lord Brown [89]
[45]Contrast H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015)
[46][2008] UKHL 63

capable of breaching A14 ECHR was justified and to what extent.[47] The Secretary of State still had to justify the discrimination as pursuing a legitimate aim and being proportionate to that aim, however as the discrimination was not one of the core protected grounds under A14,[48] 'the court's scrutiny of the justification advanced will not have the same intensity as when a core ground of discrimination is in issue.'[49] This lesser intensity of review led to a finding for the executive. Lord Mance accepted the Secretary of State's justification for how the executive had chosen to allocate resources in that it pursued a legitimate aim and was proportionate, although he was still careful to note some 'residual doubt'.[50] On the authority of *R (Carson) v Secretary of State for Work and Pensions*,[51] Lord Neuberger opined that the justification put forward by the Secretary of State was not unreasonable.[52] However, in an effort to reinstate a role for the court he went on to say that;

> Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable. However, this is not such a case in my judgment.[53]

Despite the wider latitude and deference afforded to the executive within the purview of A14 review, there was still an acceptable line that the Appellate Committee was not prepared to allow the executive to deviate from.

Another finding *for* the executive based upon an A14 ECHR challenge came in *Al-Serbia v Secretary of State for the Home Department*.[54] The Appellate Committee confirmed the lesser standard of review in executive decision-making where the substance of the claim is based on an A14 non-discrimination ground which is parasitic upon substantive Convention rights. The Appellants relied upon A14 to challenge the propriety of the indefinite leave to remain concession that was granted to children arriving in the UK with families as compared to those arriving without parents. Lord Bingham demonstrated that the policy had to be looked at objectively, through the eyes of both parties, to determine whether it had a legitimate aim. From the appellant's perspective it appeared unfair to grant a lesser immigration status to children who have already suffered the loss of their

[47] *RJM,* n46 [10]
[48] *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 [15]; 'Characteristics such as race, caste, noble birth, membership of a political party and (here a change in values since the Enlightenment) gender, are seldom, if ever, acceptable grounds for differences in treatment.'
[49] *RJM,* n46 [14] (per L.Mance)
[50] *RJM,* n46 [15]
[51] *Carson,* n48
[52] *RJM,* n46 [56]
[53] *RJM*, n46 [57]
[54] [2008] UKHL 42

parents. Nevertheless, from the Secretary of State's perspective it was simply an administrative tool put in place as there was 'difficulty, delay and expense' associated with removing families.[55] Lord Hope added that an administration that did little to address the backlog in asylum claims and made no effort to promote greater efficiency 'would be failing in its duty of sound government.'[56] He also felt that how to address these problems lay 'peculiarly within the executive's area of responsibility'.[57] Once again, the court recognised the need for the executive (and Parliament) to make general policy where 'bright lines' had to be drawn.[58] The case reiterated *R (on the application of RJM)* in that a different standard of review applies to A14. 'Adulthood' had not been recognised as one of the grounds that required 'particularly weighty reasons' to support a difference in treatment.[59] Lord Hope went on to provide guidance on when the courts will intervene;

> Deliberate discrimination will always risk intervention by the judiciary. But a difference in treatment of people outside the so-called suspect categories which is simply a by-product of a legitimate policy will not normally do so.[60]

The case was one of four cases all taken against the Secretary of State for the Home Department[61] and heard in succession by the same panel of Law Lords.[62]All 4 cases related to immigration matters, however the first three were based on A8 complaints and *Al-Serbia* was based on an A14/A8 complaint. Each had a similar judgment gap (mean 72 days) and judgment length (mean 18 pages) and returned a unanimous verdict. Nevertheless, the Appellate Committee imposed a stronger standard of review of executive action where A8 was engaged and *Al Serbia* was the only case where the executive was successful and the lower court upheld.

Chikwamba v Secretary of State for the Home Department[63] was one of the three cases where the executive lost on the proportionality of requiring an appellant with a child to apply for leave to enter the UK from abroad under s65 Immigration and Asylum Act 1999. The court held that it was disproportionate to separate a 4 year old child from her mother for several months simply to gain entry clearance.[64] Lord Scott criticised the executive for seeking to send the appellant back to

[55] *Al-Serbia,* n54 [2]
[56] *Al-Serbia* , n54 [6]
[57] *Al-Serbia,* n54 [8]
[58] *Al-Serbia,* n54 [51] (per L.Brown)
[59] *Al-Serbia,* n54 [9]
[60] *Al-Serbia*, n54 [10]
[61] *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40; *E B Kosovo v Secretary of State for the Home Department* [2008] UKHL 41 and *Al (Serbia)*, n54
[62] Lord Hope, Lady Hale, Lord Brown, Lord Bingham, Lord Scott.
[63] *Chikwamba*, n61
[64] *Chikwamba,* n61 [8] (per L.Hale)

Zimbabwe when she had every prospect of success and queried why she could not remain in the UK. He was unimpressed by the response that it was government policy to do so and suggested that 'this [wa]s elevating policy to dogma.'[65] Lord Brown clearly demonstrated the level of enquiry into executive policy that proportionality-based review of a substantive Convention article, such as A8, required. The court will look beyond the acceptable legitimate aim put forward of 'the maintenance and enforcement of immigration control' and ask 'precisely what purpose is served and what in reality is achieved by this policy?'[66] This involved uncovering the 'real rationale' for the policy which Lord Brown believed to be deterrence rather than queue jumping.[67] He also used the facts of other immigration cases that had come before the court to probe the Secretary of State as to why the policy in the instant case was not applied to those persons and thus subtly disarmed the executive by demonstrating that the policy was not being applied consistently.[68] *Chikwamba* revealed how close the court came to determining the merits of policy in proportionality-based review of a substantive Convention article and the difference, again, in the intensity of the review depending on the article of the Convention engaged.

The impact of the Convention on the Orthodox Institutional Relationship; Judicial Review

The three-dimensional relationship was not just evident in the Convention context but also appeared to have a more subtle impact on the orthodox judicial review mechanisms of the executive and also in characterising the relationship between the executive and the judiciary in the time period. The influence of the Convention could be seen in the willingness to separate the legal from the political and to find matters justiciable, especially where a matter affected an individual's rights and had not been subject to legislative scrutiny. The Convention may also have been influential in the suggestion, made in the time period,[69] that the rule of law legitimises judicial review powers where an individual's rights are affected.

Justiciability

Matters of 'law' and 'policy' rarely come neatly packaged and instead an element of judicial excavation is usually required.

[65] *Chikwamba,* n61, [62]
[66] *Chikwamba,* n61 [39]
[67] *Chickwamba,* n61[40]
[68] *Chikwamba,* n61 [43]
[69] *Mohammed Jabar,* n18 [53]

> The courts … have always distinguished -artificially- the separate provinces of 'law' and 'policy', and have, for the most part, contented themselves with regulating such matters as the extent of powers conferred by statute and the observance of such judge-made procedural rules as 'natural justice'.[70]

The enactment of the HRA and the advent of proportionality-based review have brought the distinction between law and politics and the relative competencies of each state institution into even sharper focus. The distinction has been managed by the court through fluctuating levels of institutional deference and an increased willingness to find matters justiciable. Justiciability and deference share a close relationship in that each indicates where primary responsibility for a particular decision lies.[71] Deference is less absolute in its delineation of institutional competence and the shift from 'non-justiciability' to 'due deference'[72] in areas such as national security is regarded as one of the subtle changes to domestic adjudicative powers in the post HRA era.[73] This shift in institutional capability brings into question whether any matter can ever be deemed to be 'peculiarly within the competence of the executive'.[74] For instance, the determination of what constitutes a public emergency threating the life of the nation was only regarded as a 'pre-eminently' political question best left to the judgment of the executive and Parliament in *Belmarsh*.[75] There, Lord Bingham's leading judgment rejected any *general* notion of deference by the courts on such political questions. Instead, he viewed it as a matter of 'relative institutional competence' coupled with a healthy respect for proper 'demarcation of functions' between state branches.[76]

The influence of the Convention on the institutional relationship with the executive can therefore be witnessed in the narrowing of the margin between the legal and political and the resultant narrowing of the ground separating executive responsibility and judicial responsibility. This was evident in the transitional time period in the willingness of the court to find a route to justiciability and the methods used to isolate the legal from the political.

The Appellate Committee demonstrated that it was not prepared to accept the blanket opinion of the executive as to what constituted 'political matters' and instead proceeded to conduct its own investigation in order to unpack questions of justiciability. In *R (on the application of Baiai) v*

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[70] Blom-Cooper and Drewry, *Final Appeal*, n9, p256
[71] See A Kavannagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 LQR 222, 241 critiquing TRS Allan, 'Human Rights and Judicial Review: a Critique of 'Due Deference"' (2006) 65(3) CLJ 671.
[72] See *A*, n39
[73] Kavannagh, 'Defending Deference in Public Law and Constitutional Theory' n71, 242
[74] *R (Bancoult)*, n18 [58] (per L.Hoffmann)
[75] *A*, n39
[76] *A,* n39 [29]

Secretary of State for the Home Department[77] the Secretary of State argued that the scheme under s19 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 'involve[d] an area of broad social policy where the judgment of the legislature and executive should be given considerable weight.'[78] Lord Bingham, nevertheless, felt that this was 'too sweeping'. He conceded that certain matters were aspects of political judgment and not for the court to assess however,

> the court cannot abdicate its function of deciding whether as a matter of law the section 19 scheme, as promulgated and operated, violated the respondents' right to marry guaranteed by article 12. The answer to that question does not turn on considerations of broad social policy but on an accurate analysis of the scheme and law.[79]

The Appellate Committee was therefore prepared to launch its own investigation into the boundary between law and policy.

In *R (on the application of A) v London Borough of Croydon*,[80] the willingness of the Supreme Court to find a justiciable matter divorced from the evaluative decision was evident. Contrary to the Court of Appeal, Lady Hale found the decision of whether someone was 'a child' to be a 'limiting condition stated in objective terms' and a jurisdictional question for the courts, capable of divorce from the more evaluative judgment of 'whether the child [wa]s in need'.[81] In so ruling, she accepted that the 'evaluative' decision of what service to provide was principally for the local authority, subject to the judicial review grounds of fair process and unreasonableness. Nevertheless, she also dismissed any notion that evaluative decisions could never be part of legal decisions as courts were quite used to making value judgments in children's care proceedings as part of the legal decision over what order to make. The express acknowledgement of the need for judges to also make evaluative decisions will be welcomed by those who have pointed out the fallacy of the positivistic notions that judges merely declare the law and instead value judicial honesty as to the process involved in judging.[82] The balancing exercises involved in rights-based adjudication are inherently evaluative and it may be that the HRA has prompted frankness about this aspect of judicial decision-making. The evaluative nature of judicial as well as political decision-making narrows the differences between the decision-making of the two branches even further.

[77][2008] UKHL 53
[78]*R (Baiai),* n77 [25]
[79]*R (Baiai),* n 77 [90]
[80][2009] UKSC 8
[81]*R(A)* n 80 [31-32]
[82]See M Kirby, *Judicial Activism*, Hamlyn Lectures (Sweet & Maxwell, 2004)

The narrowing of the divide between the legal and the political was also evident in the time period in the willingness for the judges to express broad opinions on policy. In *R (on the application of JL) v Secretary of State for Justice*,[83] Lord Walker commented on the state of prisons including the fact that they were overcrowded and officers found it difficult to fulfil their duty of care to each prisoner.[84] He recognised that the Secretary of State sought guidance from the court to inform the executive in future policy. After expressing the reservation that, 'there are obvious limits to how far it is for your Lordships, or any court, to give anything like detailed guidance on these matters' and that any statements made could only ever be, '… expressions of opinion', he nevertheless went on to 'tentatively' provide his view.[85] The inherent danger in the Law Lords expressing opinion on policy is the damage caused to the perception of political neutrality and the lack of democratic mandate for such a role. Nevertheless, the executive clearly welcomed the judicial view here and provided these 'opinions' are kept as generic as possible, they may prove useful in assisting with policy development and characterising the judicial-executive relationship as one of mutual cooperation.

Similarly, in *In the matter of an application by 'JR17' for Judicial Review (Northern Ireland),*[86] Lord Rodger stated that it was a matter of 'policy' to be determined by the Northern Ireland executive whether the ability to suspend a pupil on a precautionary basis was part of the school principal's general management powers.[87] Lady Hale agreed that it was a policy choice however she put forward her views on the matter anyway.[88] Lord Brown also offered his views on precautionary suspension together with practical ways that suspension on a precautionary basis could be implemented, before subtly calling on the Northern Ireland executive to address these matters.[89] The acute awareness of the political polarisation of the issue again did not detract the judges for offering their views. In doing so, they maintained institutional boundaries whilst facilitating the institutional relationship as one of mutual cooperation.

This characterisation of supportive relationship between the executive and the judiciary was evident in *Holmes Moorhouse v London Borough of Richmond upon Thames*,[90] where the Appellate Committee filled in gaps in guidance provided by the Secretary of State. Lord Hoffmann recognised that the Homelessness Code of Guidance for Local Authorities issued by the Office of the Deputy Prime Minister stated that, 'residence does not have to be fulltime and a child can be considered to

[83] [2008] UKHL 68
[84] *R(JL),* n83 [86-88]
[85] *R(JL),* n83 [90]
[86] [2010] UKSC 27
[87] *JR17*, n86 [93]
[88] *JR17,* n86 [101]
[89] *JR17,* n86 [109-112]
[90] [2009] UKHL 7

reside with one parent even where he or she divides her time between both parents,' however he felt that it lacked any guidance on when it would be *reasonable* for that child to be resident with one parent and the considerations needed to be taken into account when making that assessment. Lord Hoffmann clearly did not feel that deference to the executive was required and instead stated that, 'it is this gap which I would invite your Lordships to fill.'[91] Guidance on housing policy would traditionally lie with the executive although the courts are used to making assessments of what is 'reasonable' in judicial review cases. The case demonstrated that hard lines can be inappropriate in delineating relative institutional competence of the legal and political. Instead, where the court feels particularly well-placed to provide extra direction, the judiciary and the executive can work together to produce comprehensive guidance and thus prevent future cases coming before the courts.

Nevertheless, *R (on the application of Gentle) v The Prime Minister*[92] demonstrated that there is still a firm line where matters will be regarded as political and non-justiciable. It was argued that the government's breach of A2 of the Convention provided a legal right to demand an independent inquiry into the decision to go to war in Iraq. The Appellant requested a judicial review of the Government's decision not to hold such an inquiry. In trying to detach the legal right from the highly politicised circumstances, Lord Bingham made clear that if a legal right exists then it is justiciable in the courts. However, in deciding whether a legal right exists, the court had to consider whether the tribunal would be required to rule upon matters of 'high policy, peace and war, the making of treaties, the conduct of foreign relations,' which clearly should remain exclusively in the political domain.[93] Lord Bingham found it difficult to believe that when signing the Convention, Council of Europe members agreed to a right to a procedural inquiry into decisions to go to war.[94] Political decisions were instead to be accounted for before Parliament and the electorate rather than being reviewable in any court.[95] Thus the Appellate Committee drew a clear line between the powers of the court and powers of Parliament to hold to account political decision-making. This was the case despite the fact that the Law Lords empathised greatly with the appellants' case and candidly revealed that if there was any possible legal argument that permitted the review, the Appellate Committee would have been minded to grant it.[96]

Prerogative powers and Independent Executive Action

[91] *Holmes-Moorhouse,* n90 [18-19]
[92] [2008] UKHL 20
[93] *Gentle,* n92 [8]
[94] *Gentle*, n92 [9]
[95] *Gentle,* n92 [24] (per L.Hale)
[96] *Gentle,* n92 [17] (per Lord Hope) [56] (per L.Hale), [62] (per L.Carswell)

The effect of the Convention may also be seen in final appeal court's willingness to ensure that decision-making power was exercised via the correct state institutional channels when either the rights or legitimate expectations of individuals were affected. This resulted in a particularly robust review of executive action that had not been subject to legislative scrutiny, or was exercised under the prerogative, to ensure that proper decision-making procedures were followed. In this way, the influence of the Convention may well have had an impact on the level of deference afforded by the court in areas where the prerogative was exercised.

In *R (on the application of Bapio Action Limited) v Secretary of State for the Home Department,*[97] the Appellate Committee demonstrated that it would insist that decision-making was made through the proper channels, despite the political cost, when the decision affected the legitimate expectations of individuals. The Secretary of State's guidance on recruitment of International Medical Graduates (IMGs) as part of the Highly Skilled Migrant Programme (HSMP) was declared unlawful by the Appellate Committee. The guidance sought to give priority to home graduates for positions in the NHS and therefore undermined the legitimate expectations of the IMGs. Lord Rodger's concluding paragraph revealed that he was clearly influenced in his finding against the executive by the fact that it appeared to be trying to achieve a change in immigration policy via the backdoor.

> Obviously, the Government could have achieved its objective if it had amended the Immigration Rules. For various reasons, it chose not to do so. But if it had chosen to try to amend the Rules, it would have required to pay the political price of subjecting the proposed change and its highly damaging effects on IMGs with HSMP status in the country, to the scrutiny of Parliament.[98]

Lord Rodger's comments suggest that had the change been brought about by amending the Immigration Rules, with clear parliamentary approval, the result of the case would have been different. Thus the court viewed with particular scepticism executive changes in policy that affected the rights or expectations of individuals, which had not been openly laid before and sanctioned by Parliament.

An equally strong stance in this regard was taken by the Supreme Court in the case of *HM Treasury v Mohammed Jaber Ahmed.*[99] The case was of such import that it convened a panel of 7 Justices, including the President and Deputy President of the court as it raised, '… fundamental questions about the relationship between Parliament and the executive and about judicial control over the

[97] [2008] UKHL 27
[98] *R(Bapio),* n97 [36]
[99] *Mohammed Jabar,* n18

power of the executive.'[100] The procedure under s1 of the United Nations Act 1946 enabled the executive to make Orders in Council without parliamentary scrutiny. The Terrorism (United Nations Measures) Order 2006 and the Al-Qaida and Taliban (United Nations Measures) Order 2006 had both been made without parliamentary scrutiny, instead being laid before Parliament for information rather than having their merits subject to either the affirmative or negative resolution procedure. The Orders were fairly 'draconian' in terms of the way they affected individual rights. Lord Hope, with whom Lord Walker and Lady Hale agreed, commented that:

> The consequences of the Orders … are so drastic and so oppressive that we must be just as alert to see that the coercive action that the Treasury have taken really is within the powers that the 1946 Act has given them.[101]

The Orders were declared by the Supreme Court to be ultra vires, as Parliament needed to have the opportunity to squarely confront measures that affected the rights of UK citizens in a fundamental way. Lord Hope noted that the House of Commons Foreign Affairs Committee had recommended that such orders be subject to the affirmative resolution procedure, however the executive did not act on these recommendations in the belief that it would place the UK in breach of its international obligations were the resolutions to not be approved.[102] Lord Hope dismissed this argument on the basis that other Commonwealth countries that had previously used regulations to implement Security Council Resolutions ('SCRs'), had used primary legislation to affect asset freezing regimes.[103] Lord Rodger concurred, stating that even if Parliament chose to enact exactly the same measures as the executive, then at least those matters had 'not pass[ed] unnoticed in the democratic process.'[104] Again, *Mohammed Jabar* demonstrated the willingness of the Supreme Court to ensure that actions which impacted severely on individual rights went through the proper domestic institutional channels.

Even in cases where the court did not ultimately challenge the method by which the executive had enacted measures, it still reviewed the institutional decision-making process behind an Order in Council, responding to a SCR, to determine whether the process could have been any different. *R v Forsyth*[105]again considered the executive's powers to legislate by Orders in Council under s1 of the United Nations Act 1946. This time the court found for the executive in that the power to make an Order in Council was not time limited. The court inferred that delay was not an issue for Parliament

[100]*Mohammed Jabar,* n18 [5] (per Lord Hope)
[101]*Mohammed Jabar,* n18 [6]
[102]*Mohammed Jabar,* n18 [48-49]
[103]*Mohammed Jabar,* n18 [50]
[104]*Mohammed Jabar,* n18 [186]
[105][2011] UKSC 9

given that no time limit was mentioned in the legislation and the executive had the power to amend Orders long after the SCRs had been made.[106] The court admitted that it took a 'somewhat blinkered approach' by deciding the issue in the manner advocated by the Crown i.e. 'purely as one of principle and on the barest of facts' in order to block any future individual challenges to a delayed Order.[107] Nevertheless, where the court did adopt a slightly wider approach was in reviewing the history of measures taken against Iraq to discern that SCRs often had to respond to a changing international landscape and were rarely just one off measures. As such, there might be good reason for executive delay in implementing the measures.[108] Thus the court appeared to conduct a 'close contextual assessment of the institutional factors bearing on the case', as advocated by Kavannagh,[109] before deferring to the executive's power to determine when to implement measures. In this sense, the court did not unquestioningly *defer* to the executive's ability to determine *when* Orders in Council should come into effect and instead looked more closely at the realities of the institutional processes involved.

The justiciability of executive action under the prerogative was not a consequence of the HRA and instead was established following the decision of *Council of Civil Service Unions v Minister for the Civil Service*.[110] In, *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*,[111] the Law Lords provided a robust defence to the principles established in the *CCSU* case and did not take up the invitation to distinguish *CCSU* on the basis that it concerned a decision taken *pursuant* to powers conferred by an Order in Council rather than the *validity* of the Order in Council itself.[112] Where the HRA appeared to have an effect in *Mohammed Jabar,* was in narrowing even further the scope of what could be achieved under the prerogative and to demand certain institutional decision-making processes in decisions that affected the rights of individuals. Nevertheless in *Bancoult*, only Lords Bingham and Mance were prepared to hold that the right of abode was fundamental and that no prerogative existed to deprive the Chagossians of this right. The majority of the Law Lords upheld the two Orders in Council that forbid the Chagossians from returning to their island as they found the right of abode was not a fundamental principle that had been breached and the Chagossians had no legitimate expectation to return to the island. Lords Rodger and Carswell expressly condemned the way that the Chagossians had been treated at the

[106] *Forsyth,* n105 [12]
[107] *Forsyth,* n105 [13]
[108] *Forsyth*, n105[14]
[109] Kavannagh, 'Defending Deference in Public Law and Constitutional Theory', n71, 248
[110] [1985] AC 374
[111] *Bancoult,* n18
[112] *Bancoult,* n18 [35]

hands of the executive,[113] however in determining whether the power to legislate for the 'peace, order and good governance of the overseas territory' was in any way limiting, Lord Rodger was unambiguous in stating that such matters were not justiciable.[114] Instead, the check on inappropriate use of the power was recognised to lie in the political rather than legal domain and Parliament would be required to scrutinise the Orders.[115] Therefore, whilst *Mohammed Jabar* appeared to demonstrate a more interventionist judicial approach to Orders in Council that affected the rights or legitimate expectations of individuals, particularly in the Supreme Court, the *Bancoult* decision also revealed that much depended on the particular rights asserted. Furthermore, a clear area of non-justiciability still existed in the prerogative domain, which had not been weakened by the incorporation of the Convention.

The Rule of Law

The final area where the influence of the Convention and the jurisprudence of the ECtHR appeared to have an impact on the domestic judiciary-executive relations was in reinforcing the domestic principle of the rule of law. Firstly, ECtHR jurisprudence guided the domestic court in administering closed material proceedings in accordance with an individual's rights, where the rule of law principle of open justice had to be balanced against the public interest in national security. Secondly, the willingness to find a route to justiciability alongside the need for proper institutional decision-making, where rights were affected, appears to have reinforced the suggestion that the courts have distinct judicial review powers under the rule of law.[116] Finally, the ability to be awarded damages under s8 HRA for breach of an individual's rights may well have influenced the suggestion by certain judges, that more than nominal damages should be awarded where an individual's rights are affected by a disregard for the rule of law or a breach of public duty.

R (on the application of Corner House Research) v Director of the Serious Fraud Office[117] made clear that rule of law considerations had to occasionally be compromised in the interests of national security. The case concerned the lawfulness of the Director's decision to discontinue a criminal investigation into corruption allegations against the main contractor in an arms contract between the Government and Saudi Arabia. This decision was made in light of Saudi Arabia's threat to stop counterterrorism cooperation with the UK. Although the Divisional Court felt that the Director had

[113] *Bancoult,* n18 [75] and [119] respectively.
[114] *Bancoult,* n18 [109]
[115] *Bancoult,* n18 [109]. See also Lord Carswell at [130].
[116] *Mohammed Jaber*, n18 [53]
[117] [2008] UKHL 60. Note that this was not coded as an 'executive' in the quantitative study as the Director is appointed by the Crown but independent of it.

acted unlawfully by submitting to a threat instead of exercising the power to make independent judgment, as required by Parliament and the rule of law, the Appellate Committee allowed the appeal and declared the Director's decision to be lawful. Lord Bingham noted the high level of deference afforded to an independent prosecutor, given the wide discretion they are afforded in their role and stated that the court would only interfere with the Director's decision in 'highly exceptional circumstances'.[118] Nevertheless, the decision still had to be lawful.[119] The defence of the rule of law was perhaps not as robust as might be expected. Lady Hale suggested that the rule of law was just one of several public interest considerations that could be weighed against a serious security risk and that ultimately the latter consideration could trump the former.[120] Lord Brown felt that public authorities, in such circumstances only needed to have *due regard* to rule of law considerations and this duty was fulfilled by the Director and Attorney General, who 'gave prolonged and profound thought to the implications for the rule of law …'.[121] The rule of law did not appear to be the defining principle of the constitution where national security was at stake and instead was demoted to a consideration that had to be given due weighting in the face of a number of competing public interest concerns.

Nevertheless in *RB(Algeria) v Secretary of State for the Home Department,*[122] the court was clearly guided by the ECtHR in the acceptable compromises to the rule of law in matters of national security. The case engaged the rule of law principle of open and fair justice. The court held that the use of closed material when considering the safety on return of deportees was not unfair and did not breach principles of legality. Lord Phillips felt that there was justification for keeping diplomatic reports on the prevailing conditions in a country closed so that diplomats were free to be open and frank and so relationships between states remained uncompromised.[123] In so holding the Law Lords were influenced by the fact that the SIAC was specifically set up as a tribunal that could deal with closed material and was in response to ECtHR recommendations in *Chahal v UK.*[124] The SIAC was therefore likely to meet the requirements of the Convention.[125] The rule of law, however, demanded that ordinary courts continued to adhere to principles of open justice.[126] Again, it was evident that the demands of national security took precedence over an idealised constitution firmly based on the rule of law. Nevertheless, the court used ECtHR guidance to ensure the appropriateness of

[118] *Corner House,* n117 [30]
[119] *Corner House*, n117 [32]
[120] *Corner House*, n117 [55]
[121] *Corner House*, n117 [58]
[122] *RB(Algeria)*, n18
[123] *RB(Algeria),* n18 [93]
[124] (1997) 23 EHRR 413
[125] *RB(Algeria),* n18 [160] (per Lord Hoffmann) [229] (per Lord Hope)
[126] *RB(Algeria),* n18 [234]

alternative safeguards where there was an interference with the rule of law- for instance, only using specialist tribunals with the protection of specialist advocates to review closed material.

The interrelationship between an individual's rights and rule of law considerations was again evident in *HM Treasury v Mohammed Jaber Ahmed*,[127] as discussed above,[128] in that the rule of law demanded that decisions affecting the rights of individuals were not solely determined by the executive. The case also appeared to suggest that the rule of law can legitimise judicial review of executive action in addition to ordinary principles of judicial review. Lord Hope provided the lead judgment and compared the case to the infamous judicial-executive clash in *Liversidge v Anderson*.[129] He robustly defended rule of law principles in the context of national security:

> Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.[130]

Lord Hope's defence of the rule of law was reinforced by the consideration of an individual's rights. Firstly, he stated that the closer executive action comes to affecting the basic rights of the individual, 'the more exacting' the court's scrutiny should be.[131] He went on to state that, 'If the rule of law is to mean anything, decisions as to what is necessary or expedient in this context cannot be left to the uncontrolled judgment of the executive.' Secondly, Lord Hope approved of Lord Browne-Wilkinson's sentiments in *R v Secretary of State for the Home Department, ex p Pierson*,[132] that where general powers are conferred by Parliament there must be some implied limits to that power especially where it is exercised in such a way as to adversely affect the rights of citizens.[133] Finally, he dismissed counsel's suggestions that it was simply a matter of 'political control' that the Treasury opted to use its powers under s1 of the United Nations Act 1946 to issue freezing orders rather than using the Parliamentary affirmative resolution procedure under the Antiterrorism, Crime and Security Act 2001. Instead he confirmed the legitimacy of the court's scrutinising Treasury actions under the rule of law.[134]

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[127] *Mohammed Jabar*, n18
[128] See text at n99
[129] [1942] AC 206
[130] *Mohammed Jabar,* n18 [6]
[131] *Mohammed Jabar,* n18 [45] citing Lord Hoffmann in *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115, 131
[132] [1998] AC 539 at 573 and 575
[133] *Mohammed Jabar*, n18 [46]
[134] *Mohammed Jabar*, n18 [53]

In quashing both executive orders as ultra vires in the case, Lord Hope's leading judgment showed that the Supreme Court was not swayed by arguments of due deference to the executive's political judgment in the context of rights. Instead, the matter was justiciable on the basis of the rule of law. Thus the increasing justiciability of matters in the political context that affect an individual's rights following the incorporation of the Convention appears to contextualise Lord Hope's declaration of a power of review under the rule of law. Declaring such a power to exist, appears to be the next step in Lord Hope's previously expressed belief that, 'the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.'[135]

Lord Hope's firm belief in the rule of law could be reinforced further by the ability to award more than nominal damages where its values are breached. In *Walumba Lumba v Secretary of State for the Home Department,*[136] the Secretary of State was found to have acted unlawfully in detaining the appellants under an unpublished (potentially non-existent) policy instead of the published policy. The rule of law clearly demands that law is open and accessible so that individuals are capable of governing their conduct accordingly. The majority found the appellants to have been falsely imprisoned, however awarded only nominal damages, given that the appellants would have been detained under the published policy. The majority declined to award vindicatory damages as it was felt that the claimant could still have his rights vindicated through nominal or exemplary damages where appropriate.[137] Lord Dyson did not want to set such an 'unruly horse' loose on the law, given that such damages would be met by the public purse and could result in defensive practices of public authorities keen to avoid litigation.[138] The dissent would have awarded more than nominal damages even though it was not a case where compensatory damages were appropriate. Lord Hope was at pains to emphasise that aim of such damages was not to *punish* the executive but to recognise the *importance of the rights* breached by unlawfully detaining the individuals concerned and to act as a deterrent in future cases.[139] Lord Hope endorsed Lord Walker's belief that there had been 'a serious abuse of power and it was deplorable.'[140] Lady Hale also endorsed Lord Walker's suggested award believing that it was necessary to in some way vindicate the claimant's rights given, 'the claimant's fundamental constitutional rights have been breached by the state and to encourage all concerned to avoid anything like it happening again'.[141] Thus, where domestic constitutional *rights* had been

[135] *Jackson*, n8 [107]
[136] *Walumba*, n18
[137] *Walumba*, n18 [101] (per Lord Dyson)
[138] See *X(Minors) v Bedfordshire County Council* [1995] 2 AC 633, 750 (per Lord Browne-Wilkinson)
[139] *Walumba,* n18 [178]
[140] *Walumba,* n18 [176]
[141] *Walumba,* n18 [217]

breached, some members of the judiciary were prepared to reinforce the finding against the executive on the rule of law point by an award of damages that recognised the nature of the breach.

In *Shepherd Masimba Kabadzi v Secretary of State for the Home Department*,[142] Lord Hope refused to read *Walumba Lumba* on a narrow basis in that only nominal damages could be awarded and stated that each case would depend upon the facts.[143] The case also raised a claim for false imprisonment, this time for failure to regularly review the detention of the appellant under a published policy. The executive had discretion to detain a person without any court authorisation under the Immigration Act 1971, however the court still had to ensure that the power to detain was 'exercised reasonably and in a manner which is not arbitrary'.[144] The judges withheld their judgment until after the 9 justice decision in *Walumba Lumba*, given the similarity of the issue. Following the frank executive disclosures in *Walumba Lumba*, Lord Hope revealed his scepticism of the Home Secretary's position that published policies on detention were always applied.[145] The court awarded damages at common law for false imprisonment, however in doing so the dissenting view in *Walumba Lumba* on the damages award was not discounted. It therefore remains open to the Supreme Court, on the right facts, to award more than nominal damages as a deterrent to the executive breaching the rule of law and detaining persons unlawfully.

The impact of the Convention in characterising the Relationship between the Court and the Executive

The orthodox understanding of the nature of judicial-executive relations centres on terminology such as the 'review' and 'scrutiny' of executive action and lends support to the idea that the relationship between the judiciary and the executive is one of tension. The use of these terms can mask the finer characteristics of the relationship that centres upon a mutual respect and understanding between the institutions. The observational data revealed two areas where the influence of the Convention may have had an effect on the more subtle characteristics of the relationship between the judiciary and the executive in the time period. The first was the relevance of the wider context that executive decisions are made within to the review of executive action. The second was the search for executive intent as a means of justifying the decisions or actions that the executive had taken.

[142] [2011] UKSC 23
[143] *Shepherd*, n142 [55]
[144] *Shepherd,* n142 [49] (per Lord Hope)
[145] *Shepherd*, n142 [27]

The Context of Executive Decisions

The judges recognised that the executive often work in an imperfect setting where policy and decision-making are constrained significantly by limits on resources, bureaucracy and public opinion. A sharp distinction was, however, drawn between how executive contextual constraints fitted into the judicial review of executive decision-making and how they fitted into the consideration of an alleged infringement of a Convention right.

In judicial review actions, context was relevant to determining whether the decision lay particularly within executive competence and thus judicial deference was required unless the decision was plainly irrational or breached the rule of law. In *R (on the application of Ahmed) v Major and Burgesses of London Borough of Newham*,[146] it was recognised that difficult decisions, taken with a view to resource constraints, would not in themselves render the scheme to be irrational or unlawful.[147] Lady Hale endorsed the words of the Depute Judge that 'judges must be particularly slow in entering the politically sensitive area of allocations policy by overbroad use of the doctrine of irrationality.'[148] Lord Neuberger further recognised that the court was not best suited to determining such matters given that 'housing allocation policy is a difficult exercise which requires not only social and political sensitivity and judgment, but also local expertise and knowledge.'[149] The exception to this was when the court felt that it had a 'duty' to intervene such as 'if a policy does not comply with statutory requirements, or if it is plainly irrational.'[150] Allocation policies were therefore not immune to being *ultra vires* however the court was sensitive to the political context and the democratic mandate of the executive to make difficult decisions.

In the Convention context, however, alleged contextual difficulties did not change whether a Convention right had been infringed without justification. Thus in *R (on the application of AP) v Secretary of State for the Home Department*,[151] Lord Dyson was not swayed by the 'practical difficulties' that the executive faced in seeking to uncover the effect of a control order on a controllee. Even in cases where the control order time period was not in itself enough to constitute a deprivation of liberty, the Secretary of State was still obliged to 'have regard to' the effect of the order on the controlee, otherwise she may find herself in breach of A5(1).[152]

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[146] [2009] UKHL 14
[147] *R(Ahmed),* n146 [7].
[148] *R(Ahmed),* n146 [22]
[149] *R(Ahmed)*, n146 [46] (per L.Neuberger)
[150] *R(Ahmed),* n146 [46] (per L.Neuberger)
[151] [2010] UKSC 24
[152] *R(AP),* n151 [31]

Furthermore, in *R (on the application of JL) v Secretary of State for Justice*,[153] where the court ruled that an attempted suicide of a prisoner with a risk of long term injury necessitated an enhanced type of investigation under A2 ECHR, Lord Brown confirmed that, '… the nature and extent of the state's article 2 obligation in cases of near-suicide cannot be measured in monetary terms.'[154] Instead the executive would need to consider how to keep costs within manageable limits, whenever the Secretary of State carried out the enhanced investigation required by A2.[155]

The judges were still understanding of the difficulties faced by the executive in balancing its constitutional role alongside the requirements of the Convention. In *EB Kosovo v Secretary of State for the Home Department,*[156] Lord Bingham recognised that, 'the search for a hard edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.'[157] The Appellate Committee held that the delay in processing EB's claim should have been taken into account when assessing the proportionality aspect of his human rights claim. There was considerable sympathy demonstrated by the judges towards the role that the executive had to undertake in the immigration context, in particular the need to develop general policies and rules in an area where the law requires the rights of individuals to be taken into account. Lord Brown tried to smooth relations between the two branches by emphasising that the court's task was not to 'punish' the Secretary of State for the delay in the case or to in any way state whether the conduct was 'blameworthy' rather the court was simply looking at the effect of the delay on the applicant in light of the Convention.[158]

These cases reiterate the findings in *R (on the application of Begum) v Denbigh High School Governors*[159] and *Belfast City Council v Miss Behavin' Ltd*[160] that where Convention rights are at issue, the focus of the court is on whether those rights have been infringed substantively and not on the quality of the decision-making process.[161] The focus of the review on the substantive decision leaves less scope, in such cases, for a contextual assessment of executive decision-making and for judicial 'sympathy' (or deference) towards executive pressures.[162]

Executive Intent and Justification

[153] *R(JL),* n83
[154] *R(JL),* n83 [106]
[155] *R(JL),* n83 [106]
[156] [2008] UKHL 41
[157] *EB Kosovo*, n156 [12]
[158] *EB Kosovo*, n156, [41] and [42]
[159] [2006] UKHL 15
[160] [2007] UKHL 19
[161] See Lord Bingham in *R(Begum)*, n159 [31] and Lord Hoffman [68]
[162] *Walumba,* n18 [204] (per Lady Hale)

The importance of ascertaining legislative intent stems from the need to objectively apply the intention of the sovereign lawmaker and reflects the hierarchical relationship that the judiciary has with Parliament. The institutional relationship with the executive is less linear with more scope for review of executive action and interference with executive intent. Nevertheless, ascertaining executive intent is important in the Convention context and in domestic proportionality-based review to establish the justification for the policy. The effect of the Convention could therefore be seen in the need to ascertain executive intent and in the willingness to review the justification for a policy or decision domestically. This was evident in several cases in the time period, outlined below. As with parliamentary intent, techniques will need to be developed in order to effectively discern the true intention of the executive.

Lord Brown demonstrated that there was a difference in technique in ascertaining the intention of the executive in immigration rules compared to uncovering the intention of Parliament in statute:

> The rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument, but, instead sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy.[163]

He believed that there was no scope for a purposive style of construction and instead the Secretary of State's intention 'is to be discerned objectively from the language used, not divined by reference to supposed policy considerations.'[164]

Lord Dyson had a slightly different enquiry in *Walumba Lumba v Secretary of State for the Home Department*[165] where he sought to find out if the executive deliberately applied an unpublished policy. In order to do this, he went through a series of internal emails to uncover the attitudes to the policy by Home Office senior officials.[166] Lord Dyson used the email evidence and draft policy submission circulated to come to his conclusion that there was not a deliberate Home Office decision to keep the policy applied unpublished.[167] Thus wider evidence of executive intent was used where the enquiry did not relate to the executive intention behind written rules or secondary legislation.

[163] *Ahmed Mahad v Entry Clearance Officer* [2009] UKSC 16 [10]
[164] *Ahmed Mahad,* n163 [10]
[165] *Walumba,* n18
[166] *Walumba* n18 [156-161]
[167] *Walumba,* n18 [164]

The impact of proportionality-based review on domestic judicial-executive relations could also be seen in that the court was prepared to find a legal element to the justifications put forward by the executive for an immigration decision. Thus in *R (on the application of JS) (Sri Lanka) v Secretary of State for the Home Department*,[168] Lord Brown found the Secretary of State's reasoning in his decision letter on the application for asylum to be wrong. In order to be proper reasoning with a legal basis it needed to focus on the *actual role* that the applicant played within the LTTE as opposed to his membership of the LTTE.[169] Thus the justification of a decision on immigration status was found to have a legal as well as a political element and appeared to highlight the effect that proportionality-based review, particularly the enquiry into whether executive policy was *justified*, had on the domestic review of executive decision-making.

Relationship with Parliament

Institutional Communication

The statute, as the primary source of law in the UK, continued to be treated as authoritative across all 4 years of study. The court regarded each provision of a statute to be the product of conscious deliberation by Parliament. Lord Rodger commented that,

> … a court is sometimes forced to conclude that provisions in a statute are redundant, but the basic rule is that statutes are best construed as a whole and by giving due effect to all their provisions.[170]

In this sense a statute was acknowledged to be a 'carefully crafted code' and was one of the reasons used by Lord Phillips in *R v Horncastle* to support the legislative scheme on hearsay evidence contained in the Criminal Justice Act 2003 over that contained in the ECtHR jurisprudence.[171] *Horncastle* was one of the few cases in the time period to reject the ECtHR line. The detail and clarity of the statutory scheme in the Criminal Justice Act 2003 allowed the court to establish that when hearsay evidence was sole or decisive it did not create a mandatory block on that evidence being given. Instead, alternative safeguards could be implemented such as evidence being given anonymously.[172]

[168] [2010] UKSC 15
[169] *R(JS)*, n168 [27], [28] and [58] respectively.
[170] *McConkey v The Simon Community (Northern Ireland)* [2009] UKHL 24 [22]
[171] *R v Horncastle* [2009] UKSC 14
[172] *Horncastle,* n171 [55]

Nevertheless the time period also revealed that institutional communication was frustrated where statutory language was unclear, the statutory scheme was incoherent or when it was not comprehensive enough to deal with the problem facing the court. In each of these situations there was a failing in legislative communication and the judiciary had to respond by using different interpretative techniques and undertaking a more constructive role. Poor legislation resulted in a more active court and gave some credence to the view that the enforcing and interpreting role of the judiciary allowed the court to share sovereign power.[173] The judges, nevertheless, always sought to justify their course of action on the basis of legislative intent.

Legislative Intent and Pepper v Hart

Establishing legislative intent will always be important in a constitution governed by legislative supremacy. Acting in accordance with legislative intent objectifies the process and neutralises the judicial role.[174] Although the interpretation of statutory language is the exclusive purview of the courts,[175] its scope is limited by the constitutional need to give effect to true intention of Parliament. In this way the hierarchical relationship between Parliament and the courts is preserved.

The strongest evidence of legislative intent comes from clear statutory words and a comprehensive statutory scheme. *In re McE*,[176] the authority of clear parliamentary intent expressed in clear statutory language was strong enough to dispense with common law rights. In reviewing the interplay between the common law right of legal privilege and the Regulation of Investigatory Powers Act 2000 Pt II ('RIPA'), Lord Hope observed that certain parts of RIPA had dealt expressly with the effect of the statutory provisions on legal privilege, however the fact that Part II had not addressed the matter (which dealt with surveillance and covert human intelligence sources) must have been a deliberate Parliamentary decision to make intrusive surveillance lawful, in spite of breaching common law legal privilege.[177] Lady Hale agreed owing to the 'plain words' of the statute and the 'history of the legislation,' however she found it an 'unpalatable' conclusion.[178] In the face of this clear intention, the Law Lords recognised the simpler implied overrule technique used by Parliament, whereby provided the action taken was in accordance with RIPA, it was lawful. This

[173]See text at Chapter 1, n66
[174]J McGarry, 'The Principle of Parliamentary Sovereignty' [2012] 32(4) LS 577,596. See also Blom-Cooper and Drewry, *Final Appeal*, n9, p197
[175]Lady Hale emphasised this point in *SCA packaging Limited v Boyle (Northern Ireland)* [2009] UKHL 37 [67] whereby Departmental Guidance issued by the executive on how to interpret and apply a statute was viewed as secondary to the court's interpretation.
[176][2009] UKHL 15
[177]*In re McE,* n176 [61]
[178]*In re McE,* n176 [67]

meant that RIPA overruled earlier statutory rights to a private consultation, however the choice over *how* to draft a statute was regarded as 'a matter for Parliament.'[179]

The judicial expectation is that Parliament would usually not leave important points to be implied from the statutory words and would deal with these points expressly in legislation. In *Kay*,[180] a mass cycle ride that always began from the same point and at the same time each month but had no predetermined route was argued not to be a 'customarily held procession' within the meaning of s11(2) Public Order Act 1986, as the notification system set up by the Act *impliedly* required a predetermined route. Lord Rodger, however, felt that had Parliament intended such a result, '… then it would not have done so by a side wind in a section creating a system of notification: it would have done so specifically.'[181] Lord Rodger made similar remarks in *McConkey*,[182] which had to determine whether 'political opinion' in the Fair Employment and Treatment (Northern Ireland) Order 1998 included opinion that favoured the use of violence and if so whether past beliefs were included. He stated,

> … if the intention of the legislature had been to force everyone, however deeply affected, to ignore previous expressions of the approval of the use of violence, I would expect to find it stated in plain words on the face of the Order for all to see, not left to be unearthed in the lubrications of lawyers.[183]

Parliamentary intention was derived, on occasion, from common sense or logic. In *R (on the application of Purdy) v DPP*[184] in relation to the Suicide Act 1961, Lord Phillips commented that 'It seems unlikely that Parliament intended, in an Act whose primary purpose was to decriminalise suicide and attempted suicide, to widen the scope of assisted suicide.'[185] Similarly, in *R v G*,[186] the Committee stated:

> Parliament cannot have intended to criminalise the possession of information of a kind which is useful to people for all sorts of everyday purposes and which many members of the public regularly obtain or use, simply because that information could also be useful to someone who was preparing an act of terrorism.[187]

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[179] *In re McE,* n176 [65]
[180] [2008] UKHL 69
[181] *Kay,* n180 [42]
[182] *McConkey*, n170
[183] *McConkey*, n170 [33]
[184] [2009] UKHL 45
[185] *R(Purdy)*, n184 [3]
[186] [2009] UKHL 13
[187] *R v G,* n186 [42]

An alternative technique, and moving further away from the literal approach, was to derive Parliamentary intent from the 'policy' that lay behind a statute. In *R (on the application of M) v Slough Borough Council*,[188] the Appellate Committee was aware of the socio-political interchange that had occurred between Parliament, the executive and the courts. Parliament had enacted the Asylum and Immigration Act 1996 in response to a Court of Appeal ruling that primary legislation was needed to affect the necessary policy.[189] The Act sanctioned executive action blocking asylum seeker attempts to claim social security after failing at the point of entry.[190] This informed Lady Hale's later assertions that the court needed to be weary of interpreting 'care and attention' under s21(1)(a) of the National Assistance Act 1948 as a general power to provide housing, as the background indicated this would definitely *not* be what Parliament would have intended.[191]

The various methods that can be used to ascertain legislative intent, on occasion, led to division in the court. *Mayor and Burgesses of the London Borough of Lewisham v Malcolm*[192] centred on two interpretative issues pertaining to s24(1)(a) of the Disability Discrimination Act 1995, which required the Law Lords to understand the intention of Parliament at the time the words were enacted. Lord Brown, representing the majority view, used what appeared to be a common sense approach in identifying the correct statutory comparator under s24. He felt that Parliament must have intended the comparator test to mean something in practice and not be rendered a nullity. He declared it to be a person who had taken the action complained of and did not suffer from the disability.[193] Lady Hale dissented on this point and believed that her approach gave effect to the intention of Parliament.[194] She used the legislative history of the statute- believing the case to be one of ambiguity that sanctioned the use of such material- to conclude that 'the history alone is enough to indicate that Parliament did not intend the comparison to be with someone who did not have the disability.'[195]

Sugar v BBC [196] also divided the court and illustrated the difficulties in establishing a unanimous view as to parliamentary intent as well as the different methods used to gauge parliamentary intent. The Law Lords had to determine whether the Information Commissioner had issued a 'decision notice' under s50(3) of the Freedom of Information Act 2000 by making a decision on a report held by the

[188][2008] UKHL 52
[189]*R(M)*, n188 [19]
[190]Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996 (Si No 30 1996)
[191]*R(M)*, n188 [33]
[192][2008] UKHL 43
[193]*Malcolm,* n192 [112-113]
[194]*Malcolm,* n192 [81]
[195]*Malcolm,* n192 [78-79]
[196][2009] UKHL 9

BBC. This involved determining whether the BBC was a 'public authority'. Phillips (in the majority) believed that the BBC must either be a public body or not, even if it held exempt information, whereas Lord Hoffmann (in dissent) believed that public body status depended upon the nature of the information held. Lord Hoffmann believed his interpretation was loyal to the literal wording in the Act.[197] Lord Neuberger (in the majority) admitted that he had adopted a more purposive approach to reading the Act and parliamentary intent to avoid what he perceived to be an anomaly in the operation of the legislation. For instance, he thought it odd for Parliament to have intended that the Information Commissioner have jurisdiction under s50 to determine whether the information possessed was 'exempt,' but have no jurisdiction to determine whether a hybrid authority possessed information that was 'excluded'.[198] Both *Sugar* and *Malcolm* provided a stark example of how different judicial methods could be used to ascertain Parliamentary intent and lead to different conclusions.

Resort to *Hansard* is, on occasion, a legitimate aid to ascertaining parliamentary intent. *Pepper v Hart*,[199] made it possible to refer to the parliamentary debate during the passage of a bill to assist in elucidating parliamentary intent. Nevertheless, the use of ministerial statements in this way is controversial and can only be referred to in very limited circumstances.[200] The academic controversy stems from constitutional principle as ministerial statements made in the passage of a Bill are not intended to have any legal effect.[201] These statements are evidence of '… what the government would like the law to be'[202] as opposed to what the legislature enacted. There are also difficulties with 'attributing' such statements to the intention of Parliament as 'a composite and artificial body.'[203] These concerns were each acknowledged by Lord Hoffmann in the time period. Firstly, it affected ministerial behaviour, by providing Minsters with a motivation to make statements in the hope of influencing any future construction in the courts. Secondly, it tended to be overused in the courts where 'evidence will be produced in any case where there is the remotest chance that it may be accepted', resulting in much additional expense.[204]

[197] *Sugar,* n196 [46-47]
[198] *Sugar,* n196 [87-89]
[199] [1993] AC 593
[200] These include where '(a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a minister promoter of the Bill together, if necessary, with such other parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied on are clear.' *Pepper v Hart* [1993] AC 593 at 640C
[201] J Steyn, 'Pepper v Hart; A re-examination' (2001) 21(1) OJLS 59, 61
[202] Steyn, 'Pepper v Hart', n201, p65
[203] Steyn, 'Pepper v Hart,' n201,p 64
[204] *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38 [38]

R v JTB[205] confirmed the judicial caution in the decision to use *Hansard* and the preference, where possible, to arrive at the answer via an alternative route. The language of the relevant statutory section was ambiguous and Lord Phillips felt that it was one of the 'rare' cases where the principle in *Pepper v Hart*[206] could be invoked.[207] Lord Rodger agreed that the passages from *Hansard*, 'put the position beyond doubt,' however he would have reached the same conclusion without resort to *Hansard*. Lord Carswell concurred, and although believing it to be a case where it was legitimate to refer to *Hansard*, he personally would have used a different pathway, construing the statute and 'taking account of the mischief and consequences of the legislation.'[208] Lord Brown adopted a compromise approach, stating that it was 'one of those comparatively rare cases where weight may legitimately be put upon the parliamentary materials,' however that transparency demanded explicit acknowledgement of which ministerial statements were relied upon.[209] Interestingly, Lords Rodger and Carswell united once again in their reluctance to resort to *Hansard* in *McConkey*, where the order under consideration was not 'ambiguous, irrational or absurd' and the ministerial debate appeared 'confused'.[210]

The debate over the appropriateness of the use of *Hansard* continued into the Supreme Court. Lord Hope, with whom Lord Clarke agreed, did not deem *Star Energy Weald Basin Limited v Bocardo SA*[211] to be a case where resort to *Hansard* was permissible as it did not fall within the limited exceptions stated in *Pepper v Hart* and the executive was not seeking to place a different meaning on the words of legislation than that attributed to it when the legislation was promoted in Parliament.[212] Lord Collins expressly acknowledged the academic controversy over *Pepper v Hart*.[213] Nevertheless, Lord Brown believed that the *Pepper v Hart* exceptions were fulfilled and proceeded to use *Hansard* to establish the intended basis of compensation.[214] Again, in the Scottish case of *Farstad Supply*,[215] Lord Collins was not prepared to use *Pepper v Hart* to find out the reason why there was an omission from s736A Companies Act 1985 of a provision equivalent to s258(3) Companies Act 1985. Although it produced an absurd result, when the shares in a subsidiary company in Scotland were charged,

[205] [2009] UKHL 20
[206] *Pepper,* n199
[207] *JTB,* n205 [35]
[208] *JTB,* n205 [39-40]
[209] *JTB,* n205 [42-43]
[210] *McConkey,* n170 [34],[39] and [64].
[211] [2010] UKSC 35
[212] *Star Energy,* n211 [43]
[213] *Star Energy,* n211 [106]
[214] *Star Energy,* n211 [76]
[215] *Farstad Supply v Enviroco Limited* [2011] UKSC 16

there was no ambiguity in the statutory section itself and no clear ministerial statement which the court could use to aid interpretation of the statute.[216]

Hansard appeared to be of use when reviewing measures that affected the rights of individuals. In *R (on the application of F) and Thompson v Secretary of State for the Home Department*[217] Lord Phillips cited with approval statements made by Lord Nicholls in *Wilson v First County Trust Ltd (No 2)*[218] that the 'proportionality' of a matter could often be assessed on facts alone, however it is still permissible in such an assessment to have resort to *Hansard* to gain background on the practical impact of a statutory measure.[219] Furthermore, in *HM Treasury v Mohammed Jaber Ahmed*,[220] Lord Hope used both House of Lords and House of Commons *Hansard* to comprehend what the 1946 Government felt the purpose of the UN Bill was and to review the history of the Government's power to enact necessary measures by Order in Council. *Hansard* revealed that the 1946 Government appeared unaware that the Security Council may require states to take action against their own citizens under A41 Charter of the United Nations 1945.[221] Lord Hope used his research from *Hansard* to confirm the change of context in which the legislation now operates and that the executive should not be able to solely determine what is 'necessary' and 'expedient' when the measures taken impose coercive restraints on individuals.[222]

Divisions over the use of *Hansard* therefore remained true across the time period, with some judges being more open to its legitimate use than others. Statutory explanatory notes were acknowledged as an alternative aid to *Hansard* in two cases.[223] Explanatory notes are potentially closer to '… the shape of the proposed legislation than pre-parliamentary aids ...'[224] and may be less controversial than the use of *Hansard*. Nevertheless, these notes should only be relied upon with a degree of caution as they are prepared by civil servants and do not necessarily indicate the intention of Parliament.

Statutory Language and Interpretative Techniques

[216] *Farstad,* n215 [47]
[217] [2010] UKSC 17
[218] [2003] UKHL 40 [62-64]
[219] *R(F)*, n217 [18]
[220] *Mohammed Jabar*, n18
[221] *Mohammed Jabar*, n18 [15-16]
[222] *Mohammed Jabar*, n18 [44]
[223] *Mucelli v Government of Albania; Moulai v DPP in Creteil, France* [2009] UKHL 2 [69]; *R v Rollins* [2010] UKSC 39 [28]
[224] *Westminster City Council v National Asylum Support Services* [2002] 1 WLR 2956 [5]

The techniques used to ascertain legislative intent were again reflected in the statutory interpretative techniques used. These techniques vary in their sensitivity to the statute. Literal interpretation is the most narrow of all forms of statutory interpretation and relies upon the 'ordinary, natural meaning' of statutory words. Part of the 'rationale' behind literal statutory interpretation is to view judges simply as the enforcers of parliamentary intent which in turn assists in distancing judges from any notion of political decision-making.[225] The literal approach, however, is often too simplistic and fails to account for judicial 'choice,' not only in the interpretative technique selected but in the multiple answers to a question that can be derived from that interpretation.[226] Furthermore, statutory interpretation is 'the opposite of an austere linguistic exercise' and instead 'evaluative'; ensuring that statutes are made effective through the values of the common law that have emerged from its 'fourfold method' of evolution, experiment, history and distillation of principles.[227]

Purposive interpretation is less clinical than the literal approach and interprets the words of a statute in accordance with the *purpose* of the legislation. This form of statutory interpretation developed in line with judicial review in the 1960s and the need to determine whether legislation *could* be interpreted in a way that permitted the executive act.[228] The purposive approach is an open acknowledgement of a more *creative* judicial methodology that does not simply 'mechanically' apply the law.[229] That is not to suggest that the interpretive act is devoid of standards, instead rules of interpretation have a normative character 'as full of value as any legal principle.'[230] A review of the use of more 'creative' statutory interpretation methods, in the time period, provides an insight into the extent that the final appeal court played a constructive role in applying statutory law, and assists in establishing whether the respect shown by the final appeal court to legislative intent went beyond mere rhetoric.

The fact that the final appeal court interprets statutes in a purposive manner was openly acknowledged in the Appellate Committee in the time period:

> The time is … long-since past when legislation, especially legislation implementing this country's European obligations, is given an entirely literal as opposed to purposive effect.[231]

[225]D Nicol 'Law and Politics after the Human Rights Act' [2006] PL 722, 723-724
[226]Masterman, *The Separation of Powers in the Contemporary Constitution, Judicial Competence and Independence in the United Kingdom* (CUP, 2011), p147
[227]Laws, *The Common Law Constitution*, The Hamlyn Lectures (CUP, 2014), p6-7
[228]Nicol, 'Law and Politics', n225, 729
[229]Kirby, *Judicial Activism*, n82, p32
[230]Laws, *The Common Law Constitution*, n227, p22
[231]*Smith v Northamptonshire County Council* [2009] UKHL 27

The clarity of statutory language was central to the decision over which interpretative technique to adopt. In *R (on the application of A) v B*,[232] the judges were reluctant to use a purposive interpretation to give effect to what was presumed to be Parliament's intention, where that went against the express language of the statute. It was argued that the ordinary courts, rather than the Investigatory Powers Tribunal ('IPT'), had jurisdiction to hear a judicial review application of the decision not to allow the publication of the appellant's memoirs depicting his time in the security service. It was also suggested that s62(5)(a) of RIPA conferred exclusive jurisdiction on the IPT, but only in respect of proceedings that related to the RIPA regulated investigatory powers. Although Lord Brown, giving the leading judgment of the court, suspected that this must have been what Parliament had intended, he found that 'the difficulties of such a construction … are obvious and in the end, to my mind, insurmountable … it would involve reading into section 65(3)(a) limiting words which are simply not there.'[233] He explained that this 'would be difficult enough at the best of times' but it also went against the rest of s65(3) RIPA as properly construed.[234]

The Supreme Court was less reticent to read in words where the statute was not clear and it was required to make sense of that statute. In *R (on the application of Noone) v The Governor of HMP Drake Hall*,[235] Lord Phillips criticised the draftsman of the Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions) Order 2005 as being 'too economical' with words and responded by reading in words to make sense of provisions in the Criminal Justice Act 1991 and the Criminal Justice Act 2003.[236] Each of the judges rationalised the approach of the court in different ways. Lord Mance believed a purposive interpretation was open to the court as no literal interpretation would have made sense.[237] Lord Saville believed it must be what Parliament intended,[238] Lord Brown thought that no rational draftsman could contemplate or intend anything else[239] and Lord Judge justified it on the basis of justice and common sense.[240]

Nevertheless, a purposive statutory interpretation remained controversial and division in the court over the correct method of statutory interpretation again came back to judicial differences over whether legislative intent should be ascertained from the words used or the policy behind a statute.

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[232] [2009] UKSC 12
[233] *R(A)*, n232 [18]
[234] *R(A)*, n232 [18]
[235] [2010] UKSC 30
[236] *R(Noone)*, n235 [32]
[237] *R(Noone)*, n235 [72]
[238] *R(Noone)*, n235 [41]
[239] *R(Noone)*, n235 [43]
[240] *R(Noone)*, n235 [86]

In *R (on the application of the Electoral Commission) v Westminster Magistrates Court,*[241] Lord Phillips dispensed with a literal interpretation in favour of an interpretation that addressed the mischief he perceived the statute to address, namely to prevent foreign donations to political parties.[242]Thus, he interpreted the legislation to rebut the presumption in favour of full forfeiture where the donor *could* have been registered on the electoral roll but had not been purely as an administrative oversight. The majority believed this approach was consistent with the policy of the legislation and the established principle that 'legislation should be construed to serve its statutory purpose'.[243] Lord Rodger, however, believed the majority had usurped the role of the courts by second guessing what Parliament meant in the legislation and had substituted the *aim* of the legislation for the *means* by which Parliament had chosen to implement it using express language.[244] He did not believe the statute permitted anything less than full forfeiture to be ordered where a political party had accepted an impermissible donation.

The court also divided over whether a purposive approach to legislation extended to providing the judges with a constructive role to update the meaning of statutory words. Lady Hale felt that it was rare for the language of statutes to be fixed and that words could change their meaning over time, however she limited an otherwise wide judicial power to place statutes on a more modern footing by stating that the updated wording still had to tie in with the overall purpose of the statute.[245] Lord Rodger also regarded it as,

> … common place for courts to have to consider whether circumstances, beyond those at the forefront of Parliament's consideration, may properly be held to be within the scope of a provision, having regard to its purpose.[246]

As such, the word 'violence' in s177(1) of the Housing Act 1996 received an updated meaning from the judges in *Yemshaw v London Borough of Hounslow*.[247] Lord Brown did not officially dissent, however he could find no evidence, either in the primary meaning of the word or in the definition of 'violence' used in the statute of Parliament ever meaning to extend the term 'violence' beyond the limits of physical violence and felt that the court may be overstepping the boundary.[248]

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[241][2010] UKSC 40
[242]*R(Electoral)*,n241 [44]
[243]*R(Electoral)*,n241 [103] (Per Lord Mance); citing *R v Tower Hamlets LBC v Chetnik Developments* [1988] 1 AC 858 and [110] (per Lord Kerr)
[244]*R(Electoral)*,n241 [61]
[245]*Yemshaw v London Borough of Hounslow* [2011] UKSC 3 [26-27]
[246]*Yemshaw*, n245 [45]
[247]*Yemshaw*, n245
[248]*Yemshaw*, n245 [49-51]

The power to update statutory words was not unlimited and certain statutory words were regarded, by the judges, as more suited to being updated than others. In *NML Capital Limited v Republic of Argentina*,[249] Lord Mance felt that the words 'relating to' in s3(1)(a) of the State Immunity Act 1978 could never merit an updated meaning in the way that words which vary with 'social or professional attitudes' such as 'family', 'cruel or inhuman treatment' or 'true and fair view' could. The former words were a 'connecting factor' which Parliament cannot have expected to be used by the courts to either widen or remove state immunity.[250] Lords Clarke and Phillips dissented, with Lord Clarke believing that merely reviewing the circumstances as they were at the time of the enactment of the State Immunity Act 1978 was too narrow an approach to statutory construction.[251] Although these views didn't win around the majority in *NML,* there was still evidence in the time period of the break from a literal interpretation opening the door to the common law's reforming role and ability to refresh statutory meaning.[252]

Deficiencies in the Statutory Scheme

Legislative communication tends to be in one direction and the process of statutory interpretation has been described as 'making sense of a monologue'.[253] Nevertheless, where there were deficiencies in statutory language, the statutory scheme or in the extent to which new legislation incorporates existing judicial interpretations, this 'monologue' did not necessarily prevent a more constructive role for the court. This role is what some might term the 'broader' concept of law reform;

> An … important function of the legislature is law reform, in the broader sense of sorting out the existing law, by removing anomalies and injustices, and also ensuring that new law is technically effective. It is a task which too often is ignored by Parliament because of other demands on Parliamentary time.[254]

The 'broader' concept of law reform is technically the institutional role of Parliament, however again institutional pragmatism in the UK constitution means that it tends to fall to the judiciary.

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[249][2011] UKSC 31
[250]*NML,* n249 [97]
[251]*NML,* n249 [142]
[252]Laws, *The Common Law Constitution*, n227, p3-6
[253]Paterson *Final Judgment*, n10, p258
[254]Written Evidence submitted by Lord Carnworth to the House of Lords Select Committee on Constitutional Reform Bill, Session 2003-2004, 22nd April 2004 <www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125we10.htm>accessed 25 February 2016

A 'constructive' role was acknowledged to be required in areas where successive pieces of legislation had led to a confused picture.[255] In *Earl Cadogan v Pitts*[256] Lord Walker was critical of Parliament complicating the valuation process through successive Leasehold Reform Acts and not sticking to the simplicity of techniques used in earlier statutes. The confusion over 'hope value' in the case was just a symptom of the larger confusion.[257] Similarly, in *Commissioners for HMRC v DCC Holdings (UK) Limited*,[258] new sections added to the Income and Corporation Taxes Act 1988 by successive finance acts had created a 'patchwork' of legislation that was 'not easy reading.'[259] Lord Walker felt that '[the] difficulty lies not only in the language of particular sections, subsections and paragraphs, but in seeing how Parliament must be taken to have intended them to operate together.'[260]

Poor coordination was not just evident within statutory regimes but also in the legal system generally through the lack of acknowledgement of the interplay between the statutory and common law systems. In *Transport for London (London Underground Ltd) v Spirerose Limited*,[261] Lord Walker opined that:

> Until well into the 20th century Acts of Parliament were expressed in much plainer language than they are today … But as over the years statute law has changed both in its substance and in its style of drafting, it is sometimes difficult to discern whether Parliament intended to carry forward, or modify, or supplant the freight of judicial exposition of earlier statutes ….[262]

The extent to which prior judicial interpretations continued to apply to new legislation divided the Supreme Court in *BA(Nigeria) v Secretary of State for the Home Department*.[263] Lord Hope recognised that between the enactment of the 1993 and 2003 Immigration Acts, Parliament had changed the scheme quite dramatically and although the phrases used in statute may have remained, in his opinion, it was not simply a case of exporting the old judicial constructions into the words contained in the new statutory scheme. The value of these prior judicial interpretations would depend upon the circumstances.[264] Nevertheless, Lady Hale dissented as she believed that it was a 'well-known principle of statutory interpretation' that past judicial interpretation continue to attach

[255] *Knowsley Housing Trust v White* [2008] UKHL 70 [30] (per Lord Neuberger)
[256] [2008] UKHL 71
[257] *Earl Cadogan,* n256 [35]
[258] [2010] UKSC 58
[259] *DCC Holdings*, n258 [19]
[260] *DCC Holdings*, n258 [5]
[261] [2009] UKHL 44
[262] *TFL,* n261 [13]
[263] [2009] UKSC 7
[264] *BA(Nigeria)*, n263 [28]

to re-enacted statutory words unless Parliament expressly states that it intends a different meaning to attach to those words.[265] Institutional communication appeared to be weakened by a lack of express Parliamentary recognition of the judicial interpretations that had attached to repealed statutory words and instead the judiciary were required to make inferences from negative legislative action.

The constructive role for the court was not always a consequence of deficiencies in the coordination of the statutory scheme or in the interrelationship between statutory and common law, but rather to the inability of Parliament to foresee the problem that arose before the court. In *Scottish and Newcastle v Raguz*,[266] the difficulties in reconciling s17(2) with s17(4) of the Landlord and Tenant (Covenants) Act 1995, led Lord Hoffmann to 'the inescapable conclusion … that the draftsman of the Act had not thought through the consequences of the scheme he had adopted.'[267] He therefore chose to give s17(2) its natural meaning, which he conceded meant that s17(4) 'will largely have misfired.'[268] Even where lack of legislative foresight did not result in a *constructive* approach to the statute under interpretation, it did lead to a reversal of the 'monologue' in institutional communication, with explicit calls from the judges for 'more thought' to be given to the issue. Thus, in *Barratt Homes Limited v Dwr Cymru Cyfyngedig*[269] under the heading 'the real problem,' Lord Phillips stated that the absolute right for the owner or occupier of premises to connect to the public sewer under s106 of the Water Industry Act 1991 created no issue for a single house, however Parliament had failed to appreciate the strain on the system of connecting a whole housing development in this way.[270] He therefore specifically called for the interrelationship between 'planning and water regulation systems' to be addressed by modern law.[271]

The time period therefore revealed several instances where a constructive role was demanded of the court as a response to failings in institutional communication, deficiencies in the statutory scheme or where a matter was not foreseen by Parliament. There were also times where the court ignored the literal words of a statute to instead give effect to what it believed was the policy or intention behind the statute. Nevertheless, this more ambitious form of interpretation could perhaps be attributable to individual judicial interpretative style as opposed to a difference in institutional approach between the courts. For instance, Lord Phillips and Neuberger were clearly comfortable with adopting a purposive approach and dispensing with plain words in favour of giving

[265] *BA(Nigeria)*, n263 [39]
[266] [2008] UKHL 65
[267] *Scottish and Newcastle,* n266 [13]
[268] *Scottish and Newcastle,* n266 [13]
[269] [2009] UKSC 13
[270] *Barratt Homes,* n269 [41] and [42]
[271] *Barratt Homes,* n269 [58]

effect to a broader conception of legislative intent. Other judges, such as Lord Rodger, appeared more cautious and preferred to treat the literal words of the statute as the authoritative expression of parliamentary intent. Either way, where institutional communication via statutory wording or legislative intent was clear, there was a very deferential approach to the authority of the legislature in the time period. The next section examines institutional deference between the court and Parliament in the time period in more depth.

Institutional Deference

Sovereign power is evident not only in the authority attributed to statutory language and the respect for legislative intent outlined above but also in the authority that comes from the constitutional position that Parliament occupies as a democratic consultative institution. This section examines the extent to which these institutional characteristics of the legislature commanded deference from the judiciary in the time period, including the deference of common law to statutory law and the deference of the judiciary to the law reforming capacity of Parliament. The section concludes with a review of areas where institutional deference was not as strong, such as where there had been interference with fundamental rights and freedoms, the rule of law or the jurisdiction of the courts.

Statute Law and Common Law Constitutionalism

The institutional deference afforded to the legislature by the judiciary in the time period can to some extent be gauged by the interrelationship between the two systems of law in the UK; statute law and the common law. Statute law immediately declares the law until such time as it is repealed and can be contrasted with the more evolutionary character of the continually developing common law.[272] This intrinsic distinction results in 'judges alter[ing] the law more often, if less comprehensively than … legislators.'[273] Legislative decision-making is characterised through being a 'collective' and 'participatory' process that accounts for separate views in a democracy.[274] The legislature also has broader research powers and is able to survey the wider implications of legal reform in areas that go beyond the four corners of a certain appeal. *Final Appeal* found that 'time and again' this resulted in 'dutiful deference' by the judiciary to the legislature, particularly in areas affecting social policy.[275] The authors, however, called for more judicial action to assist in keeping

[272]Laws, *The Common Law Constitution,* n227, p21
[273]Blom-Cooper and Drewry, *Final Appeal*, n9, p360
[274]J Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20(2) OJLS 221, p223
[275]Blom-Cooper and Drewry, *Final Appeal*, n9, p261

the law up to date with societal changes.[276] This was based on findings that although Parliament tended to respond promptly to judicial calls for action, it did not always carry out a 'wide survey' of the law, as shown in the previous section.[277] Moreover, the rafts of proposed Bills and draft legislation passing through Parliament meant that delay was inevitable. Whilst the time period revealed that the common law was resilient in areas where flexibility was recognised to be a virtue, at the same time the common law did not go on the offensive, either to areas already covered by statute or to initiate legal reform.

The common law was not easily displaced by statute where flexibility was required to keep the law up to date and where the common law was well established. In *Sienkiewicz v Grief*[278] it was held that s3 of the Compensation Act 2006 had not moved the determination of liability in tort in mesothelioma cases from common law to statute. s3 applied once a person had been found liable in tort, however whether they were liable and the circumstances of that liability were still matters for the common law.[279] Lord Rodger extolled the virtues of the common law in this area and its ability to respond to the current state of medical knowledge. This was evident in the use of the 'materially increases the risk' rather than the 'balance of probabilities' test at a time when medical science remained unable to prove where the asbestos fibre derived from that caused the claimant's condition.[280] The common law was particularly recognised in the medical context for its ability to keep the law refreshed.

Nevertheless, the common law was overruled where it was impossible to reconcile it with the statutory scheme. *The Child Poverty Action Group v Secretary of State for Work and Pensions*[281] concerned a benefits overpayment and whether the power to recover under s71 Social Security Benefits Act 1992 was in addition to a power to recover under the common law of unjust enrichment. Although the arguments were 'closely balanced',[282] Lords Brown and Dyson felt that it would create administrative 'chaos' if the common law continued to apply, given that common law restitution claims could often be complex and differ from the statutory scheme in the details of recovery. The judges were influenced by the carefully prescribed statutory scheme, which did not

[276]Blom-Cooper and Drewry, *Final Appeal*, n9, p364
[277]Blom-Cooper and Drewry, *Final Appeal*, n9, p362. See also Kirby, who notes that in reality some problems are 'too particular, divisive, technical or boring to merit political attention and Parliamentary time.'; *Judicial Activism*, n82, p66.
[278][2011] UKSC 10
[279]*Sienkiewicz,* n278 [70]
[280]*Sienkiewicz,* n278 [141-142]
[281][2010] UKSC 54
[282]*Child Poverty,* n281 [12] (per Lord Brown)

appear to envisage a parallel common law power.[283] The case was also distinguishable from the cases involving fundamental rights or engaging the principle of legality where Parliament could not displace the common law unless it did so expressly or by necessary implication.[284] Lord Dyson set out a test to determine whether a common law regime was intended to coexist alongside a statutory regime namely,

> whether the differences are so substantial that they demonstrate that Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme.[285]

Lord Dyson warned against the courts being too liberal in dismissing the common law regime as it is always open to Parliament to expressly make its intentions clear. Nevertheless, the case demonstrated that even where Parliament does not expressly address the need to displace the common law, it could still be displaced implicitly.

There was also a mixed picture when it came to evidence of the common law being used to initiate legal reform. The better positioning of Parliament to examine all the issues was used to reject common law legal reform in *Spiller v Joseph*.[286] Lord Phillips rejected the opportunity to reform the defence of fair comment in defamation actions as 'the proposed reforms go beyond changes that could properly be made by this court in the orderly development of the common law.'[287] All Lord Phillips was prepared to do was rename the defence of 'fair comment' to 'honest comment' as 'the whole area merited consideration by the Law Commission or an expert committee.'[288]

Only a minority of judges who sat in *Al-Rawi v The Security Service*[289] were prepared to use the common law to effect procedural reform under the inherent powers of the court. The Supreme Court had to determine whether it had the power under the common law to order a closed material procedure for the whole or part of a civil trial for damages. The court divided 6/3 over the issue. The majority believed that a closed material procedure was not part of the common law right to a fair trial that was premised upon principles of open justice. Lords Mance, Clarke and Lady Hale, dissenting, would have allowed a closed material procedure under the common law, in certain defined circumstances however they differed over what those circumstances were. Lord Clarke had the strongest belief in the capacity for the common law to effect quite fundamental change in that

[283] *Child Poverty,* n281 [14] and [35]
[284] *Child Poverty,* n281 [31]
[285] *Child Poverty,* n281 [34]
[286] [2010] UKSC 53
[287] *Spiller*, n286 [111]
[288] *Spiller*, n286 [117]
[289] [2011] UKSC 34

'the common law, should … very rarely, if ever, say never.'[290] The differences in the dissent reinforced Lord Dyson's views that Parliament was the institution better placed to determine when it is 'necessary' to order such a procedure, 'after full consultation and proper consideration of the sensitive issues involved'.[291] Lord Hope recognised that the decision could be viewed as overly deferential to Parliament, however he believed that Parliament should determine the correct balance between principles of open justice and national security needs, acting through the 'democratic process' that involved 'consultation' and evidence gathering. The court's role was instead confined to reviewing the Convention compliancy of the procedural changes effected.[292] Lord Brown agreed, however he reflected *Final Appeal's* fears over placing too much faith in Parliament to initiate legislative reform and was troubled by whether Parliament would legislate promptly in response to the case.[293]

Institutional deference to Parliament also arose where a matter was political or involved policy. In the case of *Smith v Chief Constable of Sussex Police*,[294] Lord Phillips did not feel that the extent to which the police owed a common law duty of care to citizens to protect them from criminal activity was an easy issue for a court of law to resolve. Although judges are the masters of the common law, *Smith* involved issues of *policy* that Parliament was best placed to resolve. Thus it was for Parliament to determine the extent to which a duty of care would adversely affect the police in their duties. Lord Phillips was also guided by the fact that the Law Commission had recently issued a consultation paper dealing with this matter directly and so felt that this was an area where Parliament was better resourced than the Appellate Committee to direct legal change.[295]

Deference to Parliament on such social and political matters brought with it a need to clarify the limited role of the final appeal court in such cases. In the 'bank charges' case,[296] Lord Walker opened his judgment by making clear that the court did not seek to determine whether the charges imposed were 'fair'.[297] He emphasised that it was for Parliament to decide whether they should implement the European Directive in a more consumer friendly way and to revisit decisions made at a time that favoured 'light touch regulation'.[298] In *Radmacher v Granatino,*[299] the majority were clear that the role of the court was not to declare whether prenuptial agreements were legally binding and thus

[290] *Al-Rawi,* n289 [165]
[291] *Al-Rawi,* n289 [46-47]
[292] *Al-Rawi,* n289 [74]
[293] *Al-Rawi,* n289 [78]
[294] [2008] UKHL 50
[295] *Smith,* n294 [102]
[296] *Office of Fair Trading v Abbey National* [2009] UKSC 6
[297] *OFT,* n296 [1]
[298] *OFT,* n296 [52]
[299] [2010] UKSC 42

change the legislation in force, but rather to provide interim guidance to courts faced with prenuptial agreements as to the weighting to be accorded to them.[300] The Law Commission was due to report on the matter in 2012[301] and the court was merely providing guidance as a stopgap until Parliament had had the opportunity to fully consider the position on prenuptial agreements. The judges were aware of the need to bridge the divide between what the public may *anticipate* their role to be in a case and what that role *actually* was, given the respect and deference that the final appeal court accorded to Parliament as the legitimate law reforming institution.

The supportive role of the Law Commission to the legislature was a strong reason for deferential behaviour that arose time and again. Lady Hale dissented in *Radmacher*, however she concurred in the view that 'the law of marital agreements is a mess' and that 'it is ripe for systematic review and reform.'[302] She went on to extoll the virtues of Law Commission-led parliamentary reform, which includes the ability to review the whole area, as well as the ability to draw on the experience of the public, practitioners and other common law countries. The Commission can also examine the economic perspectives and provide a range of options as well as a proposal for reform to be laid before Parliament.[303] The need for reform to be led by a Law Commission Report and Parliament was also advocated in the dissenting opinions of Lord Hope and Lady Hale in *Jones v Kaney*.[304] Lord Hope noted that the majority had abolished immunity for expert witnesses for England and Wales only and suggested that this would have been better achieved by the legislature following a Law Commission report. He therefore urged the Scottish Law Commission to look into the position in Scotland.[305] Lady Hale agreed and commented that, '… it is irresponsible to make such a change on an experimental basis.'[306] Nevertheless, the fact that the majority felt able to make a departure from long standing precedent, without deferring to Parliament and the Law Commission, suggests that on occasion the Supreme Court is prepared to lead the way in law reform.

Indeed, there were areas where the judges were divided over whether the legislative or judicial forum was better positioned to initiate the necessary reforms. For instance, the Law Lords seemed unclear as to whether the legislature was the best forum where amendments to a common law rule were required. In *Chartbrook Limited v Persimmon Homes Limited*[307] the Law Lords stated *obiter* that

[300] *Radmacher,* n299 [7]
[301] The Consultation was extended and the final report was published on 27th February 2014; Matrimonial Property, Needs and Agreements, Law Commission Report No 343.
[302] *Radmacher,* n299 [133]
[303] *Radmacher,* n299 [134-135]
[304] [2011] UKSC 13
[305] *Jones*, n304 [173]
[306] *Jones*, n304 [190]
[307] *Chartbrook,* n204

they were not prepared to amend the common law rule in *Prenn v Simmonds*[308] that pre-contractual negotiations were inadmissible in construing a contract. Lord Rodger found the judicial forum limited in this capacity;

> … if there is to be a change, it should be on the basis of a fully formed debate in a forum where the competing policies can be properly investigated and evaluated. Although counsel presented the rival arguments with conspicuous skill, your Lordships House in its judicial capacity is not that forum.[309]

Lady Hale disagreed and demonstrated that there is a time when the judiciary are better positioned than the legislature to make amendments to the common law:

> My experience at the Law Commission has shown me how difficult it is to achieve flexible and nuanced reform to a rule of the common law by way of legislation. In the end abolition may be the only workable legislative solution … The courts, on the other hand, are able to achieve step by step changes which can distinguish cases in which such evidence is 'helpful' from cases in which it is not.[310]

The *Jewish Free School* case[311] highlighted that it can be difficult to discern when there is a fundamental problem with legislation that should be reviewed by Parliament or whether the desired result can be better achieved by judicial interpretation. The case divided a 9 judge panel over whether 'direct discrimination' could be interpreted narrowly so that the refusal to admit a child to the JFS owing to their branch of Jewish descent was actually indirect discrimination and could be justified, or whether they were obliged to follow settled discrimination law under the Race Relations Act 1976 which suggested that the admissions policy was direct discrimination and thus no justification was available. In the latter instance, the majority acknowledged that there was a problem with the legislation in this context and Parliament would need to review the law. The majority followed settled discrimination law,[312] however Lord Kerr blamed the breadth of the legislation and reiterated that the governors of the school were free from any moral blame.[313] Nevertheless, Lords Brown and Hope (dissenting) felt that it was the court's role not to interpret the legislation too widely.[314] Lord Rodger also provided a strong dissent and was quite clear that if this was genuinely *racial* rather than *religious* discrimination, then there would be no need for

[308][1971] 1 WLR 1381
[309]*Chartbrook,* n204 [70]
[310]*Chartbrook,* n204 [99]
[311]*R (on the application of E) v JFS Governing body* [2009] UKSC 15
[312]*JFS,* n311 [69] and [70]
[313]*JFS,* n311 [124]
[314]*JFS,* n311 [247] and [188] respectively

Parliament to amend the legislation as this was the very discriminatory practice which Parliament sought to outlaw. For him, the problem lay not with the legislation, but with the way that the majority interpreted the legislation.[315] The *JFS* case therefore demonstrated that grey areas exist where either the legislature or the court, acting through the common law, could perceivably address an issue. However, it also demonstrated the preference to err on the side of caution and defer to the legislature.

Degrees of Deference; interference with fundamental rights, the Rule of Law or the Jurisdiction of the Courts

Malleson predicted that the *post-Jackson* world would see the 'transition' from Parliamentary Sovereignty to constitutional supremacy and a refinement of the relationship between the judiciary and Parliament.[316] The threat to parliamentary omnipotence is especially apparent in a UK constitution where, as outlined in the introduction, alternative principles such as the rule of law are argued to command equal authority to that of a sovereign Parliament. McGarry is of the view that Parliamentary Sovereignty is a principle that can be balanced against other constitutional principles and that the 'explicitness of the language' of the statutory provision alongside 'its substance, or subject matter' will determine how much 'authority' it will command in the face of alternate constitutional principles.[317] The importance that McGarry places on the explicitness of language, accords with the finding that clear parliamentary intent and clear statutory language were the ultimate constitutional trump cards in the time period, even where fundamental rights were contravened.[318] The engagement of other constitutional principles such as the rule of law, fundamental rights or the jurisdiction of the courts did to some extent modify the level of deference afforded to the legislature in the time period, even in matters of social policy. In this sense, the institutional relationship between the judiciary and the legislature was subject to 'degrees' of deference depending on the constitutional context.

Matters of social policy did not warrant blanket deference from the court and were still found to be subject to the constitutional check required by the rule of law. In *ReP,*[319] which centred on an unmarried couple's right to adopt, Lord Hoffmann strongly denied that there was an irrebuttable

[315] *JFS,* n311 [225]
[316] House of Lords Select Committee on the Constitution (HL 151), n7, evidence submitted by K Malleson, Appendix 3.
[317] McGarry, 'The Principle of Parliamentary Sovereignty', n174, 588
[318] See *In reMcE*, n176, [61] where Lord Hope acknowledged that, 'The whole point of the system of authorisation that the statute lays down is to interfere with fundamental rights and to render this invasion of a person's private life lawful.'
[319] [2008] UKHL 38

presumption in areas of social policy that the courts could not intervene. Instead, he suggested that the courts had a guardianship role to ensure that Parliament did not *discriminate* in areas of social policy without a rational basis.[320] Lord Hope believed a distinction could be drawn depending on whether the issue was within the field of 'social or economic policy' or instead 'constitutional responsibility'. Discrimination in social policy, as a fundamental tenet of the rule of law, would always be appropriate for the review jurisdiction of the courts.[321]

Areas where fundamental rights are at stake also had an impact on the degree of deference afforded to the legislature. In *R (on the application of Countryside Alliance) v HM Attorney General*,[322] Lord Bingham noted that the 'degree of respect to be shown to the considered judgment of the democratic assembly will vary according to the subject matter and the circumstance.'[323] Although the case at hand was deemed to be a matter of social policy, Lord Hope still believed that there were 'areas where the court can legitimately intervene on the ground that it is especially well-placed to assess whether an interference is needed and proportionate.'[324] Lady Hale provided a philosophical justification for interference on the basis of substantive rights. She stated, '… democracy is the will of the people, but the people may not will to invade those rights and freedoms which are fundamental to democracy itself.'[325] These candid statements demonstrated the delicate balance to be drawn by the judges, in a democratic state, between the respect for political, social and moral judgment of the democratically elected assembly and the legitimate role that the judges play in guarding against the disproportionate and unnecessary interference with democratic fundamental rights. The ability for the court to test the proportionality of matters, where rights were at stake, limited the unquestioning deference afforded to Parliament on matters of social policy.

The Supreme Court also narrowed the deference to Parliament where the jurisdiction of the court was under threat. In *R v Chaytor*,[326] a 9 judge panel delivered an assertive, unanimous, decision that the jurisdiction of the courts was not blocked by parliamentary privilege in relation to MP expenses claims. Usually, matters deemed to be within the 'exclusive cognisance of Parliament' ousted the court's jurisdiction, unless Parliament had legislated to permit the court access to such matters.[327] Nevertheless, Lord Phillips felt that substantial inroads had been made into areas that were previously regarded as Parliament's alone and that whereas decisions as to how the expenses

[320] *ReP*, n319 [20]
[321] *ReP*, n319 [48]
[322] [2007] UKHL 52
[323] *R(Countryside Alliance)* n322 [45]
[324] *R(Countryside Alliance)* n322 [76]
[325] *R(Countryside Alliance)* n322 [114]
[326] [2010] UKSC 52
[327] *Chaytor,* n326 [63] and [67]

scheme was run was a matter exclusively for Parliament, examining 'the manner in which the scheme [wa]s being implemented' was not.[328] Lord Rodger was in no doubt that the courts had criminal jurisdiction alongside Parliament's ability to try the individuals for contempt, given that the privilege had not been asserted by Parliament in the past and the speaker would have intervened if he genuinely believed such a privilege to exist.[329] Lord Clarke concurred in that as Parliament had never claimed any such privilege, it was not now open to it to do so.[330] Thus, the shield of parliamentary privilege did not necessarily exclude the jurisdiction of the courts without further inquiry and demonstrated that the Supreme Court would not unquestioningly defer in relation to the justiciability of matters relating to Parliament.[331]

The influence of the Convention

This final section examines how the incorporation of the Convention via the HRA appeared to impact upon the orthodox institutional relationship in the time period, including the institutional communication and levels of institutional deference between Parliament and the court. The HRA has the capacity to transform the 'monologue' style of communication[332] into a dialogue between the two institutions, as well as affect levels of deference. This was recognised by Lady Hale in one of the first judgments of the time period;

> For as long as the treaties of the European Community and the European Convention on Human Rights remain part of our law, the courts cannot shrink from telling Parliament when it has infringed the rights which those treaties protect. We cannot abdicate the role which Parliament itself has given us, even if we would prefer to leave certain kinds of question to the Parliamentarians.[333]

The HRA permitted the courts to undertake Convention-compliant review of primary legislation for the first time, however this role should not be overstated. The HRA seeks to preserve legislative sovereignty and it is clear that Parliament can still choose to proceed in a Convention incompatible

[328] *Chaytor,* n326 [92]
[329] *Chaytor,* n326 [122-124]
[330] *Chaytor,* n326 [130-134]
[331] In *R (A),* n232, the Supreme Court drew a distinction between attempts to oust the jurisdiction of the courts and the allocation of jurisdiction to a particular tribunal. The court was prepared to accept that Parliament could perform the latter role.
[332] Paterson, *Final Judgment*, n10, p258
[333] *R(Countryside Alliance*, n322 [132]

manner.[334] In this sense, the HRA has not displaced the primacy of legislative intent. Nevertheless, once it is clear that Parliament regards matters to be Convention compliant, the institutional power dynamics between Parliament and the court rests largely upon the use of either s3 or s4 of the HRA.[335] Section 3 requires the court to read and give effect to legislation in a Convention compatible manner, so far as it is possible to do so, and s4 permits the court to make a declaration of incompatibility where it is satisfied that a provision of legislation is incompatible with a Convention right. Section 4 is the more deferential to the elected branches, as the latter must determine how (or whether) to remedy the deficient provisions.

The cases arising in the time period demonstrated that the orthodox characteristics of the judicial-legislative institutional relationship, outlined above, were reflected in the Convention context. Thus the difference in judicial opinion over which 'interpretative technique' was appropriate was evident in the debate over how far the s3 obligation to interpret legislation compatibly could extend. The decision whether to use s3 or s4 reflected the judicial regard towards the institution that would be best placed to undertake the legislative reform. Furthermore, the need to ascertain legislative intent was still central to the court's role in the Convention context, with the starting point being the use of s19 to see whether Parliament *intended* to legislate in a Convention-compatible manner.

In *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport*,[336] the Appellate Committee appeared to have little appetite to review Parliament's decision to proceed with Convention-incompatible legislation under s19. The minister had made a s19(1)(b) HRA statement during the passage of the Communications Act 2003 as the executive was unable to categorically declare that the prohibition on political advertising was compatible with A10. Lord Bingham gave three reasons why Parliament's decision to proceed in this manner should be given a strong weighting. Firstly, he felt that 'our democratically elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy. It cannot be supposed that others, including judges, will be more so.' Secondly the s19(1)(b) statement showed that Parliament felt it was important to proceed with a ban on political advertising despite the possibility of infringement of A10. Thirdly, Parliament legislates by making general rules and hard cases should not in themselves invalidate an otherwise beneficial rule.'[337] Lord Scott was the lone voice who, given the width of the ban, was not as deferential to the legislative decision to proceed

[334]Lord Neuberger 'Who are the Masters Now?' (Lord Alexander of Weedon Lecture, 6 April 2011) <www.webarchive.nationalarchives.gov.uk/20131202164909/http:/judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-weedon-lecture-110406.pdf> accessed 22 February 2016, para 56

[335]The Crown has a right to be joined as a party to an appeal where a declaration of incompatibility is being considered; UKSC R40 and PD 9 at 9.1.2.

[336]*Animal Defenders,* n22

[337]*Animal Defenders,* n22 [33]

with incompatible legislation. Lord Scott did not issue a declaration of incompatibility, however he refused to discount the possibility that the courts could, on the correct facts, declare s319 and s321 of the Communications Act 2003 to be incompatible.[338] The deference to the parliamentary decision to proceed with incompatible legislation demonstrated the continued strength of clear legislative intent in the Convention context and meant that *Animal Defenders* was one of only three cases arising in the time period that did not follow the ECtHR line.[339]

By contrast, where Parliament intended to legislate compatibly with Convention and the court found that legislation to be incompatible, the court's role moved to determining whether a s3 or s4 remedy was more appropriate. In *R (on the application of GC) v The Commissioner of the Police of the Metropolis*,[340] the majority thought that it was possible to read the section compatibility with A8 ECHR, given the permissive language in s64(1A) of the Police and Criminal Evidence Act 1984 ('PACE'), so that the need to retain data from all suspects indefinitely was not an essential part of Parliament's scheme. The initial assessment under s19(1)(a) HRA was referred to as part of the evidence that Parliament must have *intended* the statute to be read compatibility with the Convention.[341] Lord Phillips suggested a purposive approach was required, in the Convention context, to allow for parliamentary intent to change since the legislation was enacted. Therefore, even if Parliament had not envisaged the restraints on retention of data imposed by Strasbourg, it did not follow that it wished the police to continue without restraint.[342] The purposive approach under the HRA allowed a very broad approach to be taken to what Parliament intended. The dissent, however, felt that, despite the discretionary language used, it was the intention of Parliament in s64(1A) of PACE to permit indefinite retention of biometric data from suspects of crime and that the police were *obliged* to retain that information indefinitely. Lord Rodger, in supporting a declaration of incompatibility under s4, and taking a literal approach to the statutory wording, was quite clear that the majority were 'contradicting' the legislation.[343] Furthermore, he suggested that institutional deference to the law reforming position of Parliament, together with the likelihood of amending legislation being enacted, was relevant to the decision whether to use s3 or s4.[344] He reminded the majority that Parliament had demonstrated that it was 'willing to pass amending legislation' and that there were several possible avenues to achieving this, of which the court was ill equipped to select

[338] *Animal Defenders,* n22 [42]
[339] *VgT,* n22
[340] [2011] UKSC 21
[341] *R(GC*), n340 [70] (per Lady Hale)
[342] *R(GC),* n340 [57]
[343] *R(GC),* n340 [115]
[344] A point raised in KD Ewing and JC Tham 'The continuing futility of the Human Rights Act' [2008] PL 668, 683-684

one.[345] The judges therefore differed in whether to take a literal or a purposive approach to Parliamentary intent when the HRA was engaged and also in whether it was institutionally more appropriate to defer to Parliament to amend the legislation.

Indeed, *GC* demonstrated that whilst judicial dicta exists to support a strong reading under s3, judicial dicta also exists that limits what is permissible under s3 and the judges appeared to divide over which they aligned themselves with. Although Lord Phillips did not believe that this was a case where it was necessary to go against legislative intent, he used the authority of *Ghaidan v Godin-Mendoza*[346] to state obiter that s3 can sometimes, 'result in the court according to a statutory provision a meaning that conflicts with the natural meaning of a statutory provision'.[347] He therefore approved of Lord Bingham's dicta in *Sheldrake v DPP*[348] that the s3 HRA interpretative obligation was so strong that it could require the court to take a different path from the legislative intention of Parliament.[349] These statements confirm previous expressions of the reach of s3 made by Lord Phillips.[350] In other words s3 alters the traditional role of the judiciary in seeking to find and loyally implement Parliament's intent outlined above and permits the court to give effect to an implicit parliamentary intent to not legislate contrary to the Convention. On the other hand, Lord Rodger reminded the majority of the limits of the interpretative obligation under s3, in that legislation should be read compatibly 'so far as it was possible to do so' and cited the words of Lord Nicholls in *In Re S(Minors)* that, '… a meaning which departs substantially from a fundamental feature of an act of Parliament is likely to have crossed the boundary between interpretation and amendment.'[351]

The boundary can be difficult to discern. Reading in a proportionality requirement to a statutory provision fell on the right side of the line in *Manchester City Council v Pinnock*.[352] The court rejected the argument that to give the county court power to consider the proportionality of a demotion order relating to a secure tenancy, where previously the court's powers were limited to reviewing the procedural steps, would amount to an *amendment* rather than an *interpretation* of s143D(2) of Housing Act 1996.[353] This was so even though the proportionality review would allow the court to examine the substance of the claim. On the other hand, an interpretation that went against specific directions in a statute fell on the wrong side of the line. In *AS(Somalia) v Secretary of State for the*

[345] *R(GC)*, n340 [115]
[346] [2004] UKHL 30
[347] *R(GC*), n340 [54]
[348] [2004] UKHL 43 [28]
[349] *R(GC),* n340 [54]
[350] *Mohammed Jabar,* n18 [117]
[351] Lord Rodger at [113] citing Lord Nicholls; [2002] 2 AC 291 [40]
[352] [2010] UKSC 45
[353] *Pinnock*, n352 [75-77]

Home Department,[354] the specificity of the directions in s85(5) of the Nationality, Immigration and Asylum Act 2002 to the adjudicator meant that, 'reading them down would be to cross the boundary between interpretation and amendment of the statute.'[355]

The judges provided some indication as to *how* they read down a statute in *Principal Reporter v K*.[356] There, s3 was used so that 'relevant person' in s93(2)(b) Children (Scotland) Act 1995 included more persons with an established relationship to a child and adhered to A8 requirements. The method selected would depend upon three factors, firstly the Convention right infringed, secondly finding a solution that was most in keeping with the 'grain of the act' and lastly going no further than is necessary to cure the incompatibility.[357] Parliamentary intent was important and the words inserted were thought to be in keeping with the general scheme of the legislation. Nevertheless, the court did not rule out a stronger form of interpretation under s3 where this was required. *Obiter* comments suggested that had A6 been infringed then 'considerable violence would have to be done to the language of section 93(2)(b) in order to put it right.'[358] As in the non-Convention context, purposively reading words into a statute or reading those words down, was much more sensitive than where a Convention compatible reading could be achieved by giving the words in the statute their full weight.[359]

The controversy that surrounds the extent of the s3 power could be avoided by more frequent use of s4 and deferring to Parliament to remedy the defect. The court will, however, consider carefully the *need* to issue a s4 declaration of incompatibility. *Doherty v Birmingham City Council*[360] revealed that a declaration will not necessarily be issued if amending legislation is already before Parliament.[361] Thus it is not simply *declaratory* as its name suggests, it must have a *functional* role of alerting Parliament to the incompatibility. That said, in *R (on the application of Wright) v Secretary of State for Health,*[362] the court made clear that notification of new legislation *per se* was not enough to prevent a declaration of incompatibility being issued in circumstances where the court had not heard argument on whether the replacement legislation was Convention compatible. These cases suggest a degree of political sensitivity attaches to the decision to grant a declaration, however both *Doherty* and *Wright* also emphasised the inherent respect that s4 retains for sovereign legislative

[354][2009] UKHL 32
[355]*AS (Somalia)*, n354 [19] per Lord Hope citing Lord Rodger in *Ghaidan,* n346 [121]
[356][2010] UKSC 56
[357]*Principal Reporter*, n356 [66]
[358]*Principal Reporter*, n356 [67]
[359]See *R (on the application of L) v Commissioner of the Metropolis* [2009] UKSC 3 [44] (per Lord Hope) where this method was used to give effect to the applicant's A8 rights
[360][2008] UKHL 57
[361]See Lords Hope, Walker and Scott, *Doherty*, n360 [51] and [105].
[362][2009] UKHL 3

intent and the primacy of legislature's law-reforming role in the constitution. In *Doherty*, Lord Walker was clear that an integral part of the HRA mechanics was to preserve the ability for a sovereign Parliament to legislate in a way that is incompatible with the Convention and the court's role was to recognise this, but alert Parliament to the incompatibility.[363] In *Wright,* Lady Hale thought it appropriate that Parliament should strike the balance between the rights of care workers and the rights of the vulnerable adults with whom they work. She did not think it correct that the court even suggested ways to make the scheme compatible.[364]

Interestingly, Ewing and Tham have cited the procedural challenges brought in the control order case of *MB and AF*[365] as evidence of unwillingness to issue declarations of incompatibility and the judicial preference to use s3, which they regard as demonstrating a high level of deference to a sovereign Parliament in the control order context.[366] Although there was a greater use of s3 than s4 in the transitional time period, the use of s4 was acknowledged to respect Parliament's ability to legislate in a Convention incompatible manner and was used as a mechanism of institutional deference to ensure that Parliament, rather than the courts, addressed the defect. In this sense, s4 was the more deferential tool than s3; the latter playing host to the spectrum of different interpretative techniques seen in the non-Convention context that varied in their sensitivity to legislative intent and the literal word.

Conclusion

The statistical data revealed that there were an equal number of findings for as against the executive across the 4 year time period. The executive, however, was 20% more successful in the Appellate Committee compared to the Supreme Court. This *could* suggest that the Supreme Court is evolving into a more assertive court following its institutional separation; perhaps better positioned- or more willing- to challenge executive policy. Such a conclusion could only be definitively drawn on the back of a wider study that covers a larger time period and has a more specific remit to examine the circumstance surrounding executive success.

The quantitative data did, however, reveal a large amount of overlap (44%) between cases that involved both the executive and consideration of ECtHR jurisprudence, which suggests that in just under half the cases that involved the executive, there was a third institution influencing judicial-executive relations. The rest of the chapter therefore explored the nature of the three-dimensional

[363] *Doherty*, n360 [97]
[364] *R(Wright),* n362 [39]
[365] *MB and AF* [2007] UKHL 46
[366] Ewing and Tham 'The continuing futility of the Human Rights Act', n344, 681-682

institutional relationship in the time period to gauge whether it could be partly responsible for the differences in the success rate of the executive between the courts and to assess how the three-dimensional relationship impacted upon judicial-executive relations in the time period.

In terms of executive success, the quantitative data revealed that the court followed the ECtHR line on 82% of occasions and the executive was successful in 55% of these cases. The executive was also found to be more successful in cases where the Convention jurisprudence had an influence, compared to cases that did not. In Chapter 6, Table 8 reveals that less human rights cases arose in the Supreme Court than the Appellate Committee in the time period, perhaps accounting in some way for the lower success rate of the executive in that court. The relative success of the executive in the Convention field demonstrated that, in the time period, the executive- and, on occasion, the wider state- was more often than not able to conduct itself in accordance with the Convention. Furthermore, the fact that the ECtHR line of authority was very rarely departed from meant that the ECtHR was in a strong position to prescribe standards in domestic institutional decision-making and to influence judicial-executive relations within the Convention context.

The influence on judicial-executive relations in the Convention context was evident firstly in prescribing the institutional decision-making process required where a decision affected a person's rights and secondly in requiring proportionality-based review of executive decision-making. However, a review of select cases in the Convention context revealed three matters that appeared to impact on executive success. Firstly the judges' ability to divorce domestic public law failings from the standard required to meet the minimum requirements of the Convention. Secondly, the fact that the court was loyal only to the *minimum* standards required by the Convention and no more. Thirdly, the level of proportionality-based review varied depending on the article of the Convention engaged and so a more exacting form of review than domestic judicial review was not always undertaken. Instead the intensity of review was a matter of degree depending on the Convention article invoked, the nature of the claim and the margin of appreciation afforded to the executive in the context. Each of these matters no doubt affected the quantitative data's record of executive success in the Convention field and suggests that executive success may have been as much attributable to the judicial techniques employed to ascertain a Convention breach as to the executive's ability to govern itself within the strictures of the Convention.

The observational data also revealed the extent to which the incorporation of the Convention and the jurisprudence of the ECtHR impacted upon judicial-executive relations in the non-Convention context. Firstly, from a judicial perspective, there was a willingness to isolate the legal from the political and to find matters justiciable wherever possible. Furthermore, the *evaluative* nature of a

decision did not necessarily render it incapable of being characterised as a legal decision. There was also an eagerness to ensure that a proper institutional decision-making process was undertaken where the rights or legitimate expectations of an individual were affected, which in turn affected what the executive could achieve acting by Order in Council. Finally, there appeared to be the reinforcement of the domestic principle of the rule of law. The Appellate Committee demonstrated that an absolutist vision of the rule of law, on occasion, had to be compromised for the sake of national security and diplomatic relations. Nevertheless, in doing so, the jurisprudence of the ECtHR was clearly influential in monitoring the extent of the compromises to the rule of law where it affected an individual's rights, particularly where it came to administering closed material proceedings.

The rule of law seemed to strengthen further in the Supreme Court with it seemingly providing a freestanding justification to judicially review executive action, taken without legislative scrutiny that affected an individual's rights. There was also a divisive suggestion that serious breaches of the rule of law *could* in the future result in more than nominal damages as a firm rebuke to executive action. This suggestion is likely to have arisen from the ability to be awarded damages under s8 of the HRA to 'vindicate' the breach of an individual's rights and would provide teeth to declarations of unlawful conduct of the executive. Whether this arming of the rule of law can be attributed to the influence of the Convention, the move from Appellate Committee to Supreme Court or to the judge concerned is less clear. In the time period, Lord Hope proposed the freestanding justification for judicial review based upon the rule of law and was the main supporter of vindicatory damages where its principles had been breached. As such, the observational data may instead evidence the development of Lord Hope's firm belief that the rule of law is the 'ultimate controlling' factor on which the UK constitution is based.[367]

Finally, the influence of the Convention could be seen in its ability to re-characterise the more subtle aspects of judicial-executive relations, including whether the judges could take account of the wider context and circumstance in which the executive decide matters and the extent to which executive justification and intention behind policies had a legal as well as a political angle. The context of the executive decision, particularly where it was a resource allocation decision, was incorporated into judicial review through the court recognising the need for the executive to make hard decisions with limited resources. The executive was given more latitude provided its actions were not plainly unlawful. Nevertheless, determining whether Convention rights had been infringed was a 'matter for

[367] *Jackson*, n8 [107]

judicial resolution' and thus out-with the scope of any contextual conversation with the executive.[368] Furthermore, there was some evidence to suggest that the judicial investigation into executive intent and justification for policies could begin to characterise the domestic relationship between the judiciary and the executive, therefore reflecting the judicial role in the Convention context to examine the justification for an interference with a right.

The influence of the Convention and the jurisprudence of the ECtHR therefore had a tangible empirical impact on judicial-executive relations as well as executive success in the time period and may have been partly responsible for the difference in executive success rates between the Appellate Committee and the Supreme Court. By contrast the influence of the Convention in judicial-parliamentary relations did not so much *re-characterise* the orthodox relationship as *reflect* that relationship and the judicial-legislative power balance therein. This is likely to be attributable to the more linear structure between Parliament and the judiciary and the fact that the infrastructure of the HRA sought to preserve legislative sovereignty.

The orthodox relationship was characterised primarily by the need to implement legislative intent, however the judges varied in their methods of ascertaining legislative intent and in the interpretative techniques they employed. On occasion the lack of clarity in the statute required a purposive approach to be taken to ascertaining both statutory and legislative intent. This permitted a less prescriptive approach to ascertaining Parliament's aims and allowed for a more constructive approach to interpreting the statute. As a result, it shifted the relative power balance back towards the interpretative role of the judiciary. This more interventionist judicial role in statutory implementation supports the views on shared sovereignty, outlined in the introduction, which is premised upon the interpretative and enforcing role of the court.

Nevertheless, it cannot be concluded that *as an institution*, the Supreme Court was more open to the broader based interpretative techniques that realign judicial-parliamentary power boundaries. Instead, the observational data suggested that statutory interpretative style was more a matter of *judicial* rather than *institutional* preference. For instance, Lord Phillips appeared to be the most open and Lords Brown and Rodger the most sceptical towards purposive techniques. These individual positions were also reflected in each's openness to using *Hansard* as a legitimate aid to uncovering parliamentary intent. The impressionistic observations of individual judicial interpretative preferences have not been confirmed by systematic qualitative analysis. Therefore the methodologically safer ground is to suggest that the interpretative style of the court appeared to be characterised by the interpretative style preferences of the judges within the court. That said, a

[368]Masterman, 'The Separation of Powers in the Contemporary Constitution', n226, p136

more united judicial approach was evident in the need for a constructive approach to ensure the technical efficacy of statutes. A role evidently existed for the court where the statutory scheme was not comprehensive enough to envisage the situation currently before the court and there was an acknowledgement that opaque statutes in certain areas require a more active role from the court.

There was a high level of deference afforded to the legislature as the primary law reforming institution- capable of initiating wide-scale review and consultation- especially where that reform was likely to be supported by the independent research of the Law Commission. *Final Appeal* predicted that the Law Commission would balance 'excessive judicial activism' and 'excessive reliance on parliamentary intervention.'[369] Indeed, such was the support demonstrated by the Justices for the Law Commission, at times it appeared as though the judges were not just deferring to the political and social judgment of the democratically elected legislature but rather to the legislature's ability to reform the law as supported by independent legal research.

In summary, aside from the more active role of the judiciary where a statute was ineffective and the occasional individual judicial purposive approach to legislative intent, the orthodox judicial-parliamentary relationship in the time period was characterised by the need to give effect to the clear communication of legislative intent in statute and the need to defer to the wider consultative law reforming position of Parliament.

These orthodox judicial-legislative characteristics were also reflected in the Convention context. Ascertaining legislative intent was still the primary motivation of the court, albeit that there were a few additional stages to ascertaining legislative intent, where the Convention was involved. This was illustrated by the *GC* case.[370] Firstly it needed to be ascertained whether Parliament *intended* the mandatory or permissive retention of data in the substantive statute. Secondly, it needed to be established whether Parliament *intended* to legislate contrary to the Convention (as that would appear to block the court's powers of review if it had). Thirdly, once it had been established that Parliament *did not intend* to legislate contrary to Convention rights, it had to be established whether it would have *intended* for the court to utilise the s3 HRA powers to remedy the defect as far as possible or whether it was more respectful to parliamentary intent to issue a declaration of incompatibility under s4. The three stage process in *GC* confirms Nicol's view that rights based interpretation under the HRA allows the wider consideration of parliamentary intent when it enacted the HRA as well as parliamentary intent behind the specific statute and therefore provides

[369] Blom-Cooper and Drewry, *Final Appeal*, n9 p374
[370] *R (GC)*, n340

the judiciary with more latitude to legitimise their actions than purposive statutory interpretation.[371] Again, the individual judicial interpretative preferences in the non-Convention context were reflected in how widely each judge was prepared to interpret the s3 HRA obligation in *GC*, with Lord Phillips favouring a wide approach and Lord Rodger adopting more narrow reading of what was permissible under s3. Furthermore, the need for proper institutional deference to the law reforming position of Parliament, seen in the domestic context, was again reflected in the consideration over whether to use s3 to the remedy the situation or to issue a declaration of incompatibility under s4.

In this sense, the tenets of institutional communication and institutional deference that governed the institutional relationship between Parliament and the court, in the time period, were reflected in the way that the judges navigated the infrastructure of the HRA. The court's loyalty in the transitional period therefore remained to the primacy of a Sovereign Parliament.

A line of Supreme Court cases that have been determined since the close of this study suggest that the Convention may impact upon judicial-parliamentary relations going forward in a different way; by adjusting the orthodox institutional deference of the common law to statutory law. These cases suggest a growing trend to reinforce and rely upon the common law when Convention rights are at play.[372] This preference to utilise the common law is what Stephenson terms, 'the Supreme Court's renewed interest in autochthonous constitutionalism'[373] and appears to be a judicial response to the trend observed in this study- the growing influence of the ECtHR. A by-product of this could be an emboldened and strengthened common law, firmly based upon fundamental rights, that is less deferential to statutory law in the future.

[371]Nicol, 'Law and Politics after the Human Rights Act', n225, 729

[372]*A v BBC* [2014] UKSC 25 [56] and [61]. Lord Reed, giving judgment for the court, cited *Al-Rawi* alongside *Bank-Mellat v HM* Treasury [2013] UKSC 38 and *Kennedy v The Charity Commission* [2014] UKSC 20 as evidence that 'the common law principle of open justice remains in vigour even when Convention rights are also applicable.' He also referred 'to the importance of the continuing development of the common law in areas falling within the scope of the Convention guarantees,' as seen in *R (on the application of Osborn) v Parole Board* [2013] UKSC 61.

[373]S Stephenson, 'The Supreme Court's renewed interest in autochthonous constitutionalism' [2015] PL 394, 395

Chapter 5; Relationship with the Domestic Courts

It is an important pseudo-political role of the final appeal court to maintain good relations with each of the lower courts to whom it provides a revisionary function. The chapter focuses on two key themes that contextualise the institutional legal relationship between the final appeal court and the lower courts; overrule and precedent. These themes to some extent work together, with the system of precedent guiding lower courts as to the legal outcome in analogous cases and thereby minimising the chances of those courts being overruled. The regularity and circumstance of overrule indicates the level of influence that the final appeal court is exerting over the legal system, and the extent to which the system of precedent is creating certainty in the law, by successfully providing clear guidance to the lower courts. The ability for precedent and the wider system of *stare decisis* to successfully guide lower courts can also be assessed by examining the breadth or specificity of the reasoning in each authority and how resilient those authorities were in the time period.

The thematic structure of 'overrule' and 'precedent' is again used to assess the state of relations between the Scottish courts and the final appeal court, with some adjustment to focus on the acute political sensitivities in the area. For instance, the overrule section focusses on the composition of the panel overturning Scottish appeals as well as the outcomes of cases that arose under the court's new devolution issue jurisdiction. The 'precedent' section focuses on the creation of precedent in Scottish cases by using quantitative data on the volume of citations in such cases alongside observational data to compare the composition of Scottish and English judgments in the time period. In doing so, the section explores whether the final appeal court acted as an outward looking 'national' court in Scottish cases by comparing, aligning and, where necessary, distinguishing the separate legal systems in the UK or whether it acted in a manner more akin to a final court of appeal for Scotland, curtailing itself to the issues in the appeal or that which affected the wider Scottish jurisdiction.

The methodological restrictions should be recalled in that the study only looks at the relationship with the lower courts from the perspective of the cases arising in the final appeal court.[1] Quantitative data on Northern Irish appeals was collected, however as only two Supreme Court appeals originated in Northern Ireland in the time period, it was difficult to undertake any

[1]Time constraints prevented the reading of each lower court judgment. The lower court judgment was only read if further information needed to be gathered in order to code data for the empirical database. Time constraints also prevented Blom-Cooper and Drewry from, 'reading more than a fraction of the judgments in the court below.' See L Blom-Cooper and G Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon Press, 1972), p247

meaningful comparative analysis between the two courts or to assess the relationship that the final appeal court had with the Northern Irish appellate courts.[2] The Northern Irish data is included in the 'origin of appeals' quantitative analysis that opens this chapter and contextualises the overrule and precedent themes, by demonstrating which lower courts had the most interaction with the final appeal court in the time period.

The Origin of Appeals

The frequency of appeals from each originating court is displayed in Table 1 with the differences across the sessions displayed in Table 2.

Table 1. Distribution of Cases by Originating Court

		House of Lords or Supreme Court		
		House of Lords	Supreme Court	Total
Which court the appeal originated from	Court of Appeal Civil Division	83	86	169
	Court of Appeal Criminal Division	15	5	20
	High Court	10	4	14
	High Court of Justiciary	0	5	5
	Court of Session	9	9	18
	Northern Ireland Court of Appeal	8	2	10
	Northern Ireland High Court	2	0	2
Total		127	111	238

[2]The low numbers are in line with the findings in Dickson's study where only 42 appeals arose in 30 years; B Dickson, 'The Lords of Appeal and their Work 1967-1996' in *The House of Lords, Its Parliamentary and Judicial Roles* edited by Brice Dickson and Paul Carmichael (Hart Publishing, 1999), p146. Blom-Cooper and Drewry also devoted a proportionately smaller amount of analysis to Northern Ireland on the basis that the similarities to the English legal system meant that it could be regarded as 'an extension of [the court's] English jurisdiction'. See *Final Appeal,* n1, p387.

Figure 1. Pie Chart of Distribution of Cases by Originating Court

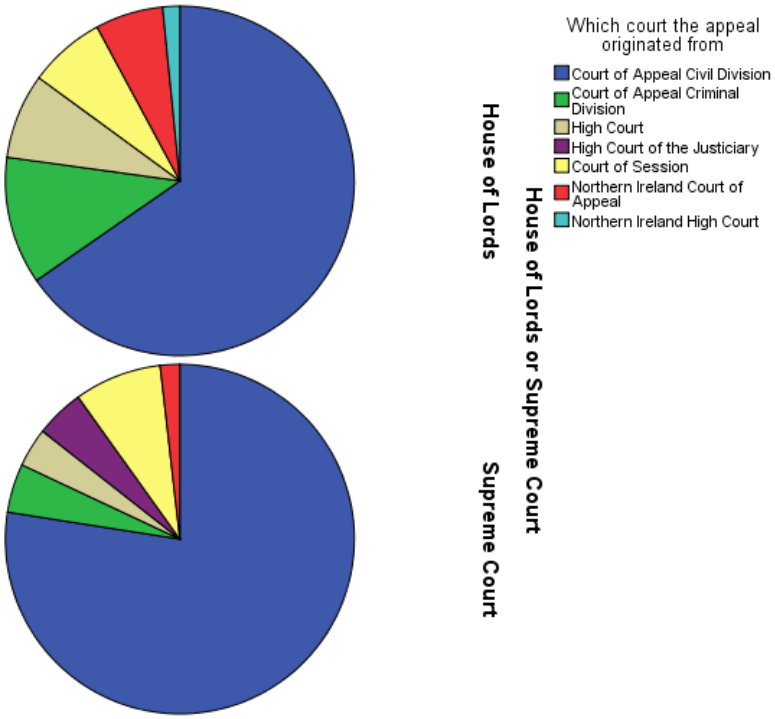
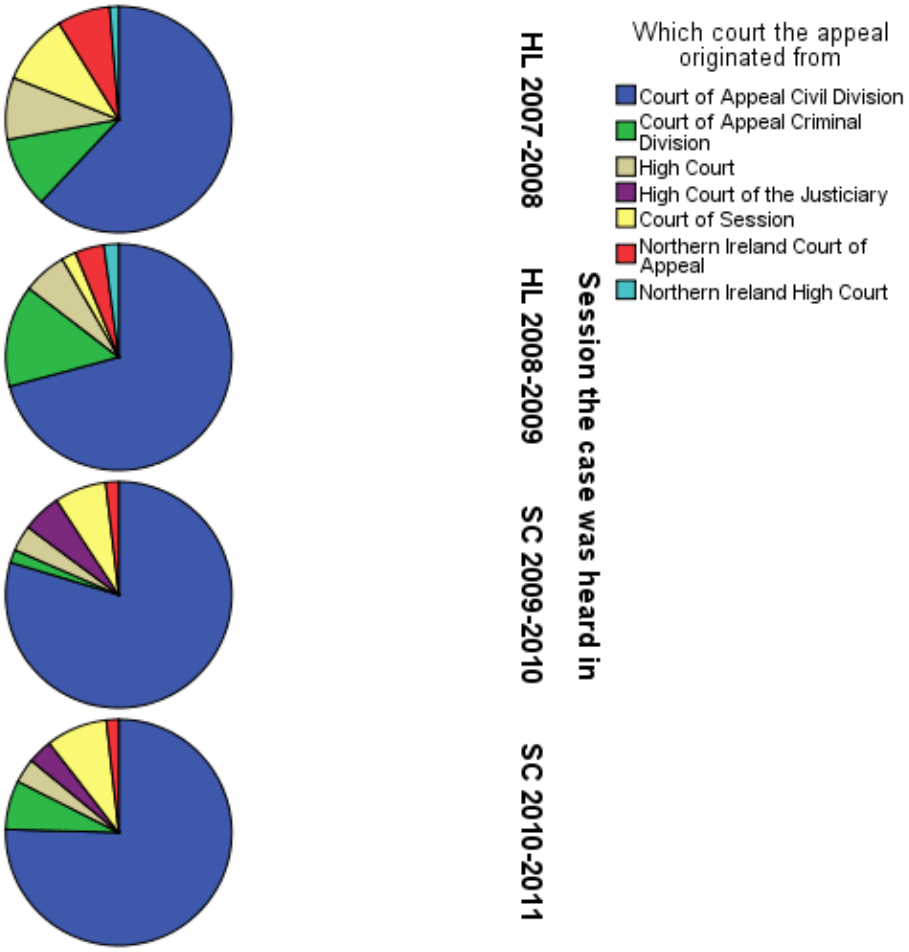


Table 2. Distribution of Cases by Originating Court and Session

		Session the case was heard in				
		HL 2007-2008	HL 2008-2009	SC 2009-2010	SC 2010-2011	Total
Which court the appeal originated from	Court of Appeal Civil Division	49	34	43	43	169
	Court of Appeal Criminal Division	8	7	1	4	20
	High Court	7	3	2	2	14
	High Court of Justiciary	0	0	3	2	5
	Court of	8	1	4	5	18

	Session					
	Northern Ireland Court of Appeal	6	2	1	1	10
	Northern Ireland High Court	1	1	0	0	2
Total		79	48	54	57	238

Figure 2. Distribution of Cases by Originating Court and Session



The respective tables and pie charts reveal both similarities and differences in the distribution of appeals heard by each of the two courts. As has been found in previous studies,[3] appeals from the Court of Appeal (Civ) dominated the workload of the final appeal court across all 4 years, with a 10%

[3]Dickson found that between 1967-1996 the CA Civ supplied 65% of appeals '… and from the mid-1970s there [was] a noticeable increase in the annual number reaching the House of Lords from that source.' B Dickson, 'The Lords of Appeal and their work 1967-1996', n2, p144

increase in such appeals recorded in the Supreme Court.[4] There was also a corresponding decrease in the number of appeals in the Supreme Court originating in the Court of Appeal (Crim),[5] the High Court,[6] the Northern Ireland Court of Appeal[7] and the Northern Ireland High Court.[8] Only 2 Northern Irish appeals came before the Supreme Court, compared to 10 in the Appellate Committee. By contrast, the addition of the devolution issue jurisdiction amounted to 5% of the Supreme Court's overall workload, meaning that the number of appeals that originated in Scotland increased in the Supreme Court. 9 appeals originated in the Court of Session for both the Appellate Committee and the Supreme Court,[9] however with the devolution issue jurisdiction just under 13% of the Supreme Court's overall workload originated in Scotland, compared to 7% of the Appellate Committee's workload.[10] Table 2 demonstrates that there was variation between sessions, although this was less marked in the Supreme Court, which had a broadly similar profile across both years of study. Overall, the statistics underline the need for a strong institutional relationship between the final appeal court and the Court of Appeal (Civ). Furthermore, a strong institutional relationship with the Scottish courts is also becoming increasingly important, given the consistency in the number of Court of Session appeals in the transitional period, together with the addition of the new devolution issue jurisdiction.

The periodical fluctuations in the origin of appeals to the final appeal court meant that it was illustrative to compare the results in this study with the annually published judicial statistics. These statistics are recorded by year rather than session, however they still provide useful comparative data.[11] The percentage of Court of Appeal (Crim) appeals recorded in the first two years of the Supreme Court was at least 5% less than the percentages recorded in 2004, 2005 and 2006 in the Appellate Committee and correspondingly the Court of Appeal (Civ) figures recorded in the Supreme

[4]CA Civ appeals accounted for 65% of the Appellate Committee's workload compared to 77% of the Supreme Court's workload.
[5]CA Crim appeals accounted for 5% of the Supreme Court's workload compared to 12% of the Appellate Committee's workload.
[6]EWHC appeals accounted for 4% of the Supreme Court's workload compared to 8% of the Appellate Committee's workload.
[7]NICA cases accounted for just 2% of the Supreme Court's workload compared to 6% of the Appellate Committee's workload.
[8]No appeals from the NIHC arose in the Supreme Court in the time period and only 2 such appeals arose in the Appellate Committee.
[9]Paterson notes that '… only very rarely between 1930-2009 did … Scots Appeals determined by the House exceed 10 a year'. See *Final Judgment, The Last Law Lords and The Supreme Court* (Hart Publishing, 2013), p234
[10]Paterson observes that this increased to 17% of the Court's decided cases by the end of March 2013. See *Final Judgment*, n9, p234
[11]In 2006, 2005 and 2004 respectively the distribution was CA Civ; 67%,73% and 67%, CA Crim; 14%, 12% and 13%, EWHC; 6%, 8% and 3%, CoS; 11%, 4% and 13%, NICA; 2%, 3% and 4%, NIHC; 0% for each year. See Official Judicial Statistics < https://www.gov.uk/government/collections/judicial-and-court-statistics>

Court were circa 5% higher than the percentages recorded in 2004, 2005 and 2006 in the Appellate Committee. The Court of Session figures were around average for the last 10 years, and the time period did not include an annual spike in such cases, as had occurred in previous years.[12] The official statistics also reveal that the low numbers of appeals from Northern Ireland are not out of line with previous years. Indeed a decline in Northern Irish appeals has been identifiable since the 1960s.[13] Furthermore, the low numbers recorded in the official statistics from the High Court suggest that the leapfrog process under the Administration of Justice Act 1969 has never fully established itself as a rival route of appeal.[14] This looks set to continue in the Supreme Court with the decline in High Court appeals indicating a preference to hear appeals that have been through the process of refinement of a first tier of appeal.

The official statistics suggest that the drop in Court of Appeal (Crim) appeals is noteworthy. The numbers recorded evidence a continued decline in criminal appeals that began in the final decade of the Appellate Committee.[15] This is so, despite past empirical studies finding a greater willingness for the Appellate Committee to grant leave to appeal in criminal cases.[16] The wider implication of a steady reduction in criminal appeals is the ability for the Supreme Court to remain as a generalist court, exercising supervisory jurisdiction over all areas of law. *Final Appeal* identified the need to have sufficient case numbers in any given subject area to permit comprehensive law-making and the ability to develop an expertise.[17] The House of Lords made some notable errors in the criminal

[12]Between 1998-2007, 4 appeals a year were the norm with the occasional spike of 10 appeals being recorded in 2004 and 2006 and 14 appeals in 2007. See N Walker; *Final Appellate Jurisdiction in the Scottish Legal System*, 22 February 2010, Appendix IV < http://www.gov.scot/Publications/2010/01/19154813/12>. Dickson records that 12% of appeals between 1967-1996 originated in Scotland; 'The Lords of Appeal and their work 1967-1996', n2, p146. Historically a far higher number of appeals came from Scotland. *Final Appeal* reported that almost 80% of the House of Lords' caseload came from Scotland at the start of the 19th century. At the time of writing, 1 in 5 of House of Lords appeals were Scottish however there was still fluctuation between the years with 1967 and 1968 returning 2 and 11 Scottish appeals respectively. See Blom-Cooper and Drewry, *Final Appeal*, n1, p31-35 and p241.

[13]Northern Irish Appeals were as low as 3% at the time of writing *Final Appeal.* The authors attributed this to the creation of the Republic of Ireland and the introduction of leave to appeal requirements for Northern Irish appeals; S1(2) Northern Ireland Act 1962. However, the authors also noted that the decline began prior to the enactment of this Act. See Blom-Cooper and Drewry, *Final Appeal*, n1, p36

[14]Dickson found that 'throughout the thirty-year period there were only fifty-four of these appeals. In the past ten years there have, on average, been only two such appeals per year'. This led Dickson to conclude that the procedure did little to relieve the workload pressures on the CA Civ. B Dickson, 'The Lords of Appeal and their work 1967-1996', n2, p146

[15] Paterson recorded that criminal appeals formed 24% of the Appellate Committee's overall caseload in 2000-02, 18% in 2003-05, 14% in 2006-08 and 6% in 2009-13. Paterson, *Final Judgment*, n9, p17

[16]B Dickson, 'The Lords of Appeal and their work 1967-1996', n2, p141-144

[17]Blom-Cooper and Drewry, *Final Appeal*, n1, p171 and p245

field[18] and more recently Lord Carnworth has observed that, 'few of the Law Lords are likely to have recent experience of criminal law. Their relatively rare incursions into this field have not always been found helpful by the lower courts.'[19]

The low number of criminal appeals being heard by the Supreme Court suggests that the Court of Appeal (Crim) is likely to retain its authoritative criminal speciality and that court's relationship with the Supreme Court will be less well developed. This could lead to the Supreme Court's criminal expertise being diluted by a 'continuous preoccupation with the civil law,'[20] however the criminal law is acknowledged to contain fewer technicalities that can only be grasped with expertise.[21] Given the criticism of the Appellate Committee in this field, the more removed nature of appellate supervision may strengthen relations with that division and avoid any accusations of unwelcome intrusions into the jurisprudence developed by the lower court. Nevertheless, the long-term effects of such a trend will be that the system of criminal precedent becomes more focussed on lower court decisions and the overturn of this court is likely to become even less common going forward.

The Origin of Appeals, Overrule and the Efficiency of the Court

Appeals from certain lower courts such as the Court of Appeal (Crim), the High Court and the Northern Ireland Court of Appeal could be heard, on average, in less than 2 days and a higher proportion of cases from these courts would have the capacity to reduce the average length of hearing. Table 3 demonstrates, however, that the caseload of the final appeal court was dominated by appeals from the Court of Appeal (Civ) which had the second highest average hearing length. Interestingly, the most time-consuming appeals to hear came from the High Court of Justiciary. Devolution issues are by their very nature important constitutional issues that often raise Convention compatibility matters. Therefore, the two courts with the longest hearing time were those where Convention-related issues were most likely to arise. The longer time taken to hear devolution issues may also be partly attributable to the sensitivities involved in indirectly hearing

[18] *DPP v Smith* [1961] AC 290; Where the House of Lords held that Smith's *actual* intention was not material, instead he must have intended what the ordinary reasonable man would have viewed as the probable results of his actions. The results of this were eventually reversed by s8 Criminal Justice Act 1967; *Shaw v DPP* [1962] AC 220, where the Law Lords (Lord Reid dissenting) created a new offence of conspiracy to corrupt public morals and in doing so appeared to disregard fundamental principles of the rule of law and the separation of powers; *Sykes v DPP* [1962] AC 528, where the appellant was found guilty of misprision of felony (an offence which the Law Lords revived) for failing to inform the police that certain persons had stolen firearms. This too was abolished by the Criminal Law Act in 1967. See Blom-Cooper and Drewry, *Final Appeal,* n1, p276

[19] Memorandum by Sir Robert Carnwarth, 22 April 2004, written evidence submitted to the House of Lords Select Committee on Constitutional Reform Bill, Session 2003-2004 <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125we10.htm>

[20] Blom-Cooper and Drewry, *Final Appeal,* n1, p275

[21] Blom-Cooper and Drewry, *Final Appeal,* n1, p275-276

Scottish criminal appeals and the need for extra care to be taken when hearing such cases. Nevertheless, no statistically significant differences in the hearing length were recorded[22] and only five cases originated in the High Court of Justiciary during the time period. Consequently, a longer time period would be needed before any firm conclusions could be drawn.

Table 3. Originating Court and Average Length of Case

Which court the appeal originated from	Mean	N	Std. Deviation
Court of Appeal Civil Division	2.12	169	.940
Court of Appeal Criminal Division	1.75	20	.786
High Court	1.71	14	.611
High Court of Justiciary	2.20	5	.837
Court of Session	2.06	18	1.211
Northern Ireland Court of Appeal	1.90	10	.568
Northern Ireland High Court	2.00	2	1.414
Total	2.05	238	.924

A similar picture was painted by the judgment gap results, as seen in Table 4. There was a great deal of variation between the courts, however the Court of Appeal (Civ) had the longest average judgment gap, with the High Court of Justiciary coming second. At first sight, this may suggest the greater complexity involved in appeals that raised a Convention issue and the need for a longer period of time to produce the judgment, however Chapter 3 demonstrated that human rights cases only had the second longest judgment gap compared to private law matters and these were not out of line with the other subject matters.[23] Instead, the results for the Court of Appeal (Civ) are perhaps explained by the inclusion of outlier cases that had a very long judgment gap, having had made a reference to the CJEU. The results for the High Court of Justiciary could be explained by there being only 5 cases that arose in the time period and the importance for the Scottish jurisdiction that attached to these devolution issue judgments, as will be seen below.[24] The difference in judgment gap means between the courts was not statistically significant,[25] with the exception of the difference between the Court of Session and Court of Appeal (Civ). Both of these courts handle civil matters

[22] $F(6, 237) = 0.91$, $p = 0.49$.
[23] See text at Chapter 3, n36
[24] *Martin and Miller v HM Advocate* [2010] UKSC 10 and *Cadder v HM Advocate* [2010] UKSC 43 had an 83 and 153 day judgment gap respectively.
[25] $F(6, 224) = 1.00$, $p = 0.426$

however the judgment in relation to Court of Session appeals was delivered, on average, around 35 days earlier. The 95% confidence intervals for the Court of Session are quite wide and so these results need to be treated with a degree of caution. If they are representative of a wider pattern, it would suggest that either the legal issues appealed from the Court of Session were not as complex to resolve as those of the Court of Appeal (Civ) (at the time there was no requirement for leave to appeal from the Court of Session),[26] or that Scottish appeals were perhaps more discretely focussed on the jurisdiction and judgment was therefore quicker to produce. Either way, the shorter judgment gap recorded went some way to ensuring the efficient dispatch of appeals from Scotland and the overall 'operational efficiency' of sending Scottish appeals to London.[27]

Table 4. Originating Court and Average Judgment Gap

Originating Appeal Court	Mean	N	Std. Deviation	Minimum	Maximum	95%CI(l)	95%CI(u)
Court of Appeal Civil Division	91.45	168	124.141	1	1331	72.68	110.22
Court of Appeal Criminal Division	76.9	20	71.167	15	365	45.71	108.09
High Court	63.14	14	28.616	21	113	48.15	78.13
High Court of Justiciary	85.4	5	38.708	63	153	51.47	119.33
Court of Session	56.06	18	28.911	21	127	42.70	69.42
Northern Ireland Court of Appeal	78	10	33.029	41	146	57.53	98.47
Northern Ireland High Court	59	2	45.255	27	91	-3.72	121.72
Total	84.89	237	107.839	1	1331	71.16	98.62

The judgment gap results for the Court of Session continued in terms of length of judgment, with Court of Session originating appeals having, on average, the shortest judgments of all the courts. This empirically reflects the fact that judgment writing in Scots appeals was largely left to (or at least led by) the Scottish Justices.[28] Again, the shorter judgments may suggest the relatively minor importance of the issues or even the reluctance of the final appeal court to act as a more outward looking court of review rather than a final court of appeal dealing with the narrow issues arising in Scottish civil appeals. The High Court of Justiciary appeals also did not result in unduly lengthy judgments when compared to other courts. Thus the increased time taken to hear and produce judgment in such cases was not reflected in the length of the final judgment and reflects the fact that although the complexity of a Convention matter or Scottish constitutional issue took time to hear and to reach a judgment on, the writing itself was still largely left to a Scottish judge. This is

[26]This changed for all Court of Session judgments pronounced on or after 22 September 2015 as a result of the Courts Reform (Scotland) Act 2014.
[27]See Walker Report, n12, p61
[28]See discussion in text at n179 below.

where Convention cases arising in Scotland and Convention cases arising in England and Wales were treated differently. The Court of Appeal (Civ) produced the most lengthy of all the judgments, with human rights cases generally being statistically significantly longer and including a statistically significant greater number of concurring opinions. Devolution issue judgements, by contrast, were slightly shorter and potentially still characterised by their jurisdictional context. That said, none of the differences in the length of judgments between the courts displayed in Table 5 were statistically significant[29] and so no definitive conclusions could be drawn.

Table 5.Originating Court and Average Length of Judgment

Originating Appeal Court	Mean	N	Std. Deviation
Court of Appeal Civil Division	34.54	169	23.226
Court of Appeal Criminal Division	27.15	20	20.205
High Court	29.07	14	17.903
High Court of Justiciary	30.80	5	21.948
Court of Session	25.06	18	11.775
Northern Ireland Court of Appeal	33.40	10	15.328
Northern Ireland High Court	29.50	2	28.991
Total	32.71	238	21.764

Overall, the efficiency of the court, in terms of length of hearing has improved since *Final Appeal*.[30] Nevertheless, the pattern that emerged from the statistics, taken alongside the data from Chapter 3, is that the longer judgment and case length in Convention-related appeals had an effect on relations between the final appeal court and the lower courts in which those appeals arose. Chapter 3 revealed that human rights cases took, on average, a day and a half longer to hear than other subject matters and had statistically significant longer judgments with statistically significantly more concurring opinions. Whereas appeals from the Court of Appeal (Civ) replicated this trend, appeals from the High Court of Justiciary did not do so for judgment length. This suggests that devolution issues were a discrete category of case that were characterised more by their jurisdiction of origin. Appeals from the Court of Session had the shortest judgments, on average, demonstrating that

[29] $F(6,222) = 0.481$, $p = 0.822$

[30] See Blom-Cooper and Drewry, *Final Appeal,* n1, p235; '79 per cent of appeals (96 per cent of Scottish appeals, 74 per cent of English civil appeals, and 81 per cent of criminal appeals) occupied four days or less in the House of Lords; 8 per cent took only one day (or part day), 19 per cent of Scottish appeals, 4 per cent of English civil appeals and 15 per cent of criminal appeals. Only 3 per cent of Scottish appeals occupied 7 days or more, as compared with 9 per cent of English civil appeals and 11 per cent of criminal appeals.'

judgments pertaining exclusively to the Scottish jurisdiction tended to be shorter. These results may be symptomatic of the discrete way in which appeals from Scotland were handled, an idea that is more fully developed below. From an institutional relational perspective, it can be concluded that there was a difference, depending on the subject matter of the appeal and the lower court concerned, in the efficiency with which the lower court was upheld or overruled and, in some cases, the speed at which a precedent was established, distinguished or confirmed.

Overturning the lower court also had the potential to increase hearing length, judgment gap and the length of judgment and thus affect the overall efficiency of the court. Table 6 demonstrates that there was a marginal increase in hearing length where the lower court was overturned and a more significant increase in hearing length when the lower court was reversed in part.[31] The same was true for judgment gap (see Table 7) although the longest gap was found when the lower court was reversed in full. The judges, therefore, took longer to hand down judgment when the lower court was overturned, but not to a significant extent.[32] Table 8 also demonstrates that the length of the judgment increased when the lower court was overturned, particularly when the lower court was reversed in part. These results were statistically significant[33] with the *post hoc* Bonferroni test revealing the statistical significance to lie between those decisions not overruled and those reversed in part.[34]

Table 6. Overrule of Lower Court and Average Length of Case

Whether the lower court was overruled	Mean	N	Std. Deviation
Yes	2.06	106	.882
No	1.99	102	.949
Reversed in part	2.71	24	.908
Total	2.09	232	.935

[31] $F(2, 229) = 6.16$, $p = 0.002$. Post hoc analyses revealed a significant difference both between cases that were overturned and reversed in part (Mean difference = -0.59, $p < 0.05$, 95%CI -1.03 to -0.16) and decisions which were not overturned compared to those reversed in part (Mean difference = -0.699, $p < 0.05$, 95%CI -1.13 to -0.26).

[32] These differences were not statistically significant when comparing the three decisions (yes, no, part reversal) together ($F(2,228)=0.75$, $p = 0.47$). There were not statistically significant differences when these were compared in pairs, i.e. "yes" v "part reversal", "no" v "part reversal."

[33] $F(2, 229) = 3.28$, $p = 0.039$

[34] Mean difference: -12.89, $p = 0.034$

Table 7. Overrule of Lower Court and Average Judgment Gap

Whether the lower court was overruled	Mean	N	Std. Deviation
Yes	94.11	106	152.271
No	75.75	102	48.412
Reversed in part	88.70	23	32.809
Total	85.46	231	108.604

Table 8. Overrule of Lower Court and Average Length of Judgment

Whether the lower court was overruled	Mean	N	Std. Deviation	Minimum	Maximum
Yes	34.62	106	21.489	6	125
No	31.70	102	21.488	4	129
Reversed in part	44.58	24	27.924	19	126
Total	34.37	232	22.437	4	129

These results should be treated with caution. They may well demonstrate that the cases where the lower court was reversed in full or in part were more complex or reviewed more authorities. The results may also suggest that counsel was subjected to an extended period of questioning when certain Justices were minded to take a different view to the lower court, or where the Justices were trying to establish how the lower court reached its decision. Nevertheless, the only significant differences found were when a judgment was reversed in part and these statistics included conjoined appeals, where one appeal was allowed and the other was not. Grouping of appeals that raised similar issues was a practice adopted by both the Appellate Committee and the Supreme Court. The consideration of two sets of circumstances will naturally increase the length of time taken to hear the case and the length of judgment produced, however other efficiencies are thought to be gained by considering cases that raise similar legal issues together. These efficiencies include avoiding duplication of counsel's submissions and the documents produced for the appeal,[35] only requiring one hearing to be scheduled, one panel of judges to be convened and one judgment to be written. Consequently, a three day hearing for a conjoined appeal may overall be regarded as a more economical use of judicial time than several two day hearings with a separate judgment being produced for each appeal. A wider study would be required to see whether the practice of conjoining appeals, when viewed in the round, actually decreased the efficiency of the court. By

[35]UKSC PD 8; *Miscellaneous* at 8.2.1 and 8.2.2.

contrast, overturning the lower court in full had only a marginal but insignificant impact on the efficiency measurements.

Overrule of Appeals

One of the key aspects of the institutional relationship between the final appeal court and each of the lower courts is the rate at which appeals are upheld and conversely the rate at which they are overturned.[36] Tables 9 and 10 below suggest a general rise in the rate of overturn of the lower court from the *Final Appeal* time period.[37] The tables demonstrate that although marginally fewer appeals were heard by the Supreme Court in the time period examined, taking overrule and 'reversed in part' together, the Appellate Committee overruled the lower court on at least one issue in 53% of its decisions and the Supreme Court did so in 59% of its decisions.[38] The statistics are expected to be staked slightly in favour of overrule, given that leave to appeal is often granted by the final appeal court on the basis that the reasoning of the court below may be 'problematic' or may insufficiently guide lower courts.[39] As outlined in the precedent section, poor guidance from authorities can have adverse consequences in a system of *stare decisis.*

Table 9. Overrule of Lower Court by Court

		Whether the lower court was overruled			Total
		Yes	No	Reversed in part	
House of Lords or Supreme Court	House of Lords	57	59	10	126
	Supreme Court	49	43	14	106
Total		106	102	24	232

[36]R29 Supreme Court Rules 2009 state that the court may (a) affirm, set aside or vary any order or judgment made or given by that court; (b) remit any issue for determination by that court, (c) order a new trial or hearing, (d) make orders for the payment of interest; and (e) make a costs order.

[37]During that period 38% of appeals were allowed wholly or in part. This included a 36.1% success rate for English civil appeals, a 47% success rate for Scottish civil appeals, a 60% success rate for Northern Irish civil appeals and a 25.1% success rate for English and Northern Irish criminal appeals. See Blom-Cooper and Drewry, *Final Appeal,* n1, p243

[38]Note that these figures are based upon 14 instances of no data for overrule. No data could be recorded where the case related to an CJEU reference, it was an Attorney General's Reference, it related to a costs order, it involved the temporary suspension of an order or the decision to grant an anonymity order. In such instances there was no lower court decision to overrule.

[39]See Paterson, *Final Judgment*, n9, p209

Table 10. Overrule of Lower Court by Session

		Whether the lower court was overruled			Total
		Yes	No	Reversed in part	
Session the case was heard in	HL 2007-2008	37	36	4	77
	HL 2008-2009	20	23	6	49
	SC 2009-2010	25	22	3	50
	SC 2010-2011	24	21	11	56
Total		106	102	24	232

The number of judgments overruled for each originating court is shown in Table 11 with the percentages displayed in Figure 3. Only the Court of Appeal (Civ) and the Northern Ireland Court of Appeal had more cases overturned in full than upheld and in the latter case the difference was just one appeal. The Court of Session had its decision overturned in full in exactly the same number of instances as it had its decision upheld and the High Court of Justciary had 40% of its cases overturned. The Court of Session would join the list of courts where overruled cases outnumbered cases upheld, were the reversed in part statistics to be included.

The percentages in Figure 3 demonstrate that there was a higher success rate for English civil appeals (49.7%) to that found in *Final Appeal* (36%) and a marginally lower success rate for Scottish civil appeals (44.4% compared to *Final Appeal*'s finding of 47%). The success rate for criminal appeals also appeared to have risen slightly, at 35% for the Court of Appeal (Crim), compared to a 25.1% success rate for English and Northern Irish criminal appeals in *Final Appeal*'s study period. 3 of the 12 Northern Irish appeals were perceived to relate to a criminal or criminal procedure matter and in each the lower court was upheld.[40] Therefore, the inclusion of Northern Irish criminal appeals would bring the overall success rate for criminal appeals down from 35%. The figures suggest that the final appeal court was more comfortable overruling civil appeals than criminal appeals, however the court overruled more criminal appeals in the time period than in the 1960s. The opening section revealed that the number of appeals from the criminal division continued to decline in the Supreme Court. If this pattern continued, it could result in a decline in Supreme Court criminal expertise and reduce the frequency with which the Court of Appeal (Crim) is overruled. *Final Appeal* drew an analogy between Scottish appeals and criminal appeals in terms of the relative expertise of the final appeal

[40] *Ward (AP) v Police Service of Northern Ireland* [2007] UKHL 50; *In re Maye (AP) (Northern Ireland)* [2009] UKHL 9; *In re McE (Northern Ireland)* [2009] UKHL 15

court compared to the lower court, however Scottish appeals had a greater chance of success than criminal appeals in the time period and did not appear to command the same hesitation to overrule.

Table 11. Overrule of Lower Court by Originating Court

		Whether the lower court was overruled			Total
		Yes	No	Reversed in part	
Which court the appeal originated from	Court of Appeal Civil Division	79	62	18	159
	Court of Appeal Criminal Division	7	13	0	20
	High Court	4	9	1	14
	High Court of Justiciary	2	3	0	5
	Court of Session	8	8	2	18
	Northern Ireland Court of Appeal	5	4	1	10
	Northern Ireland High Court	0	2	0	2
Total		105	101	22	228

Figure 3. Bar Chart of Overrule of Lower Court by Originating Court

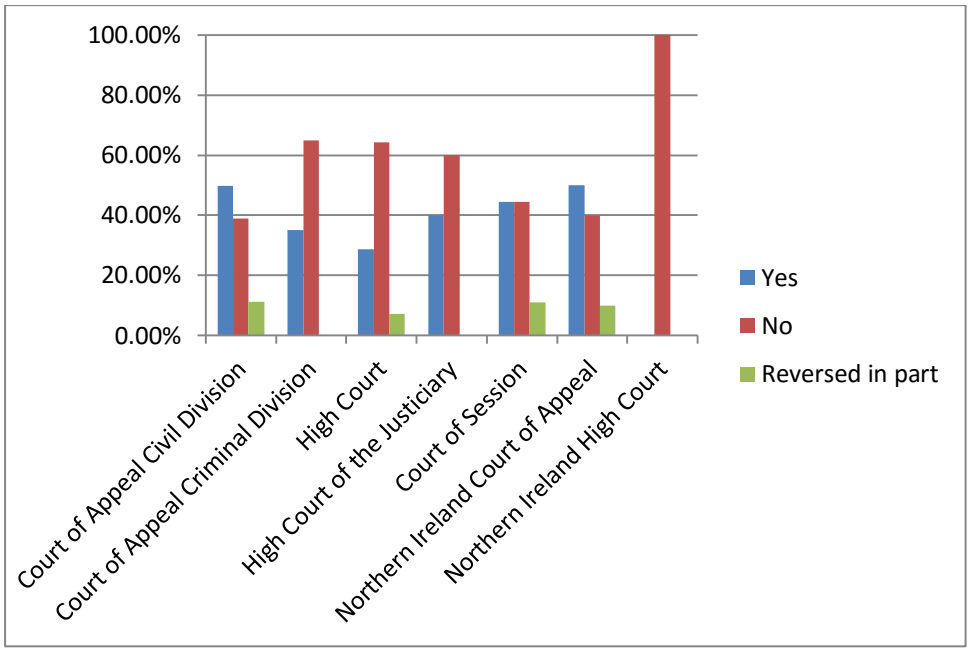


Table 12 demonstrates the rate of overrule of each court as between sessions. There were more cases overruled than upheld in the Court of Appeal (Civ) across all sessions bar the Supreme Court 2010-2011 session whereby the overturn rate equalled the uphold rate. Nevertheless, with reversed in part judgments included, the rate of disapproval of the Court of Appeal (Civ) still outweighed the

rate of approval in that session. The picture for the Northern Ireland Court of Appeal was not as consistent, with 100% of its appeals being upheld in session 2008-2009 despite being overruled more often than being upheld in all of the other sessions. The results for the Court of Session also did not show any consistency across the sessions, however numerically they were more revealing. The Appellate Committee upheld 6 appeals, overruled 2 appeals and reversed in part 1 appeal. The Supreme Court only upheld 2 appeals, overruled 6 appeals and reversed in part 1 appeal. Thus the success rate of appeals from the Court of Session was 22% in the Appellate Committee compared to 67% in the Supreme Court (not including reversed in part statistics). This reduced to a 57% success rate of Scottish appeals in the Supreme Court when devolution issues were considered.[41] The Supreme Court also appeared more willing to overrule the Northern Ireland High Court, however only a very small number of cases were returned in the time period and as a result it was difficult to draw any conclusions. An interesting pattern developed when the Court of Appeal (Crim) figures were examined as they revealed that that lower court was not overruled at all in the Supreme Court, yet it was often overruled in the Appellate Committee. The Supreme Court therefore already appeared to be regressing back to a low success rate for criminal appeals; even lower than that recorded in *Final Appeal.* This perhaps reflects the smaller numbers of criminal appeals that came before the court alongside the acknowledged inexperience of the Justices in the criminal field. Indeed the Supreme Court would be keen to avoid any controversy in its fledgling years that would signal a repeat of the axel of criminal cases that generated so much criticism for its predecessor.[42]

Table 12. Overrule of Lower Court by Originating Court and Session

Session	**HL 2007-08**			**HL 2008-09**		
Court / Overruled	**Yes**	**No**	**Reversed in part**	**Yes**	**No**	**Reversed in part**
Court of Appeal Civil Division	55.3	40.4	4.3	50.0	35.3	14.7
Court of Appeal Criminal Division	50.0	50.0		42.9	57.1	
High Court	28.6	57.1	14.3		100.0	
Court of Session	25.0	75.0				100.
Northern Ireland Court of Appeal	50.0	33.3	16.7		100.	
Northern Ireland High Court		100.0			100.	
Total	48.1	46.8	5.2%	41.7	45.8	12.5
Session	**SC 2009-10**			**SC 2010-11**		

[41]The overall statistic reduced if statistics up to 2013 are considered. Paterson reports the success rate of Scottish appeals being 43%. See *Final Judgment*, n9, p237

[42]See n18

Court / Overruled	Yes	No	Reversed in part	Yes	No	Reversed in part
Court of Appeal Civil Division	52.6	39.5	7.9	40.0	40.0	20.0
Court of Appeal Criminal Division		100.0			100.0	
High Court		100.0		100.0		
Court of Session		100.0		100.0		
High Court of Justiciary	100.0				100.0	
Northern Ireland Court of Appeal	75.0	25.0		60.0	20.0	20.0
Northern Ireland High Court				100.0		
Total	49.0	44.9	6.1	44.4	38.9	16.7

In order to provide weight and authority to the decision to overrule, and to smooth the relationship with the lower court, the final appeal court may try to garner unanimity and reflect the strength of its decision in the judgment style selected. For instance the court could choose to provide a single judgment, limit the number of concurring or dissenting opinions and/or increase the panel size. This next section reviews the extent to which the decision to overrule the lower court affected unanimity levels and the judgment style used by the final appeal court.

Final Appeal found dissent occurred more often when the lower court was being overruled.[43] Table 13 merged overrule in full and overrule in part into one column. Interpreting the results in the same way as *Final Appeal*, of the 62 appeals where there was dissent in the final appeal court, only 50% overruled the lower court compared to a 56% overrule rate overall. On a different presentation, when the lower court was overruled in some way, the final appeal court was unanimous in 76% (130/ 232) of cases compared to when the lower court was not overruled where it was only unanimous in 70% (71/102) of cases. Contrary to the findings in *Final Appeal*, this suggests a marginally increased effort to be unanimous where the lower court was overturned. The fact that there was still a divided court in one quarter of decisions reflects the fact that cases that reach the final appeal court tend to involve issues that are very closely balanced.

[43] 50% of appeals with a dissent overturned the lower court compared to a 36% overturn rate overall. 67% of Scottish Appeals with a dissent overturned the lower court compared to a 47% overturn rate overall. See Blom-Cooper and Drewry, *Final Appeal,* n1, p190

Table 13. Overrule of Lower Court by Unanimity of Final Appeal Court

		Overrule		
		Yes	No	Total
SCHL_Unanimity	SC/HL Divided	31	31	62
	SC/HL Unanimous	99	71	170
Total		130	102	232

Table 14 reveals whether any particular lower court was more likely to benefit from a unanimous decision provided by the final appeal court. The English courts had a very similar rate of unanimous final appeal court judgments: Court of Appeal (Civ) (74%), Court of Appeal (Crim) (75%) and the High Court (71%). The Scottish courts returned a higher unanimity rate; High Court of Justiciary (80%) and Court of Session (100%), whereas the Northern Irish courts had the lowest rate of unanimity at 50% for both the Northern Ireland Court of Appeal and the Northern Ireland High Court. Clearly the Scottish courts benefitted the most from unanimous judgments. Caution needs to be attached to the results for Northern Ireland, given the low numbers of cases involved however it appears that the Justices dissented in cases arising from this jurisdiction far more than in cases arising from Scotland. This may be owing to the greater familiarity that the Justices had with the Northern Irish legal system, which is more in line with that in England and Wales.

Table 14. Originating Court and Unanimity of Final Appeal Court

		SCHL_Unanimity		
		SC/HL Divided	SC/HL Unanimous	Total
Which court the appeal originated from	Court of Appeal Civil Division	44	125	169
	Court of Appeal Criminal Division	5	15	20
	High Court	4	10	14
	High Court of Justiciary	1	4	5
	Court of Session	0	18	18
	Northern Ireland Court of Appeal	5	5	10
	Northern Ireland High Court	1	1	2
Total		60	178	238

Tables 15 and 16 respectively demonstrate that there was no relationship between the number of concurring and dissenting opinions provided depending on whether the lower court was being overruled or upheld.[44] Table 17 also demonstrates that although there was a slightly higher average number of concurring opinions when the lower court was reversed in part, generally there was no difference in the average number of concurring opinions depending on whether the lower court was overturned or not.[45] For dissenting opinions (see Table 18) there was a slightly lower average dissent rate where the lower court was overturned. This suggests, contrary to the findings in *Final Appeal*, that overrule cases did not necessarily prompt the Justices to dissent or, as Lee suggests, to provide extra justification for the decision to overrule.[46] Furthermore, the decision to overrule the lower court was no more likely to split the final appeal court and may slightly increase the chances of a unanimous judgment.

Table 15.Overrule of Lower Court and Number of Concurring Opinions

		Whether the lower court was overruled			
		Yes	No	Reversed in part	Total
No of concurring opinions provided in the case	0	22	26	4	52
	1	16	13	4	33
	2	25	18	5	48
	3	14	16	3	33
	4	25	24	6	55
	5	1	2	0	3
	6	1	1	1	3
	7	2	1	0	3
	8	0	1	1	2
Total		106	102	24	232

Table 16. Overrule of Lower Court and Number of Dissenting Opinions

		Whether the lower court was overruled			
		Yes	No	Reversed in part	Total
No of dissenting opinions provided in the case	0	82	71	17	170
	1	8	15	4	27
	2	12	13	1	26

[44]There were 233 concurrences when the lower court was overruled compared to 224 concurrences where the lower court was upheld.

[45]$F(229) = 0.42$, $p = 0.66$ and $t(230) = 0.01$, $p = 0.78$, respectively

[46]Lee thought that overturn may prompt a judge to provide a concurring opinion either to 'chastise' the lower court or out of respect for that court. See 'A Defence of Concurring Speeches' [2009] PL 305, 324

	3	3	1	2	6
	4	0	2	0	2
	5	1	0	0	1
Total		106	102	24	232

Table 17. Overrule of Lower Court and Average Number of Concurring Opinions

	N	Mean	Std. Deviation
Yes	106	2.20	1.659
No	102	2.20	1.780
Reversed in part	24	2.54	2.000
Total	232	2.23	1.745

Table 18. Overrule of Lower Court and Average Number of Dissenting Opinions

Whether the lower court was overruled	Mean	N	Std. Deviation
Yes	.43	106	.916
No	.51	102	.898
Reversed in part	.50	24	.933
Total	.47	232	.907

The relationship between the number of concurring opinions and overruling either a unanimous or a divided lower court was then tested to see if it revealed any differences (see Table 19). A marginally higher average number of concurring opinions was recorded when the lower court was divided, whether it was overruled or upheld. Therefore, despite previous assertions,[47] the judges were not more likely to write when overruling a unanimous lower court in the time period.

Table 19. Overrule of Lower Court (Overrule and Reversed in Part Combined), Unanimity of Lower Court and Average Number of Concurring Opinions

What the result was in the lower court	Overrule	Mean	N	Std. Deviation
Unanimous	Yes	2.21	108	1.713
	No	2.16	93	1.789

[47]See Paterson, *Final Judgment*,n9, p99

	Total	2.19	201	1.745
Divided	Yes	2.45	20	1.849
	No	2.56	9	1.740
	Total	2.48	29	1.785
Total	Yes	2.25	128	1.730
	No	2.20	102	1.780
	Total	2.23	230	1.749

Another way to add weight to an overrule decision is to use a single judgment. Certain of the lower courts were more likely to benefit from the efficiency gains of having a single judgment delivered than others (see Table 20). 22% of all appeals originating in the Court of Appeal (Civ) were single judgments, compared to 40% of the Court of Appeal (Crim) originating appeals. 36% of the High Court, 0% of the High Court of Justiciary, 39% of the Court of Session, 10% of the Northern Ireland Court of Appeal and 50% of the Northern Ireland High Court originating appeals were single judgments. Discounting the latter result, as only 2 cases arose in the time period, it can be seen that the largest percentages were returned for the Court of Session and the Court of Appeal (Crim). These results confirm the favoured use of single judgments in specialist areas, such as criminal law, to increase certainty in the law.[48] Scots law is also a specialist area, where the political sensitivities in the institutional relationship with the Scottish lower courts appear to make it appropriate for the specialist Scots law Justice or Law Lord to write the judgment of the court. This will be reviewed more closely below, when the focus moves to relations with the Scottish courts.

Table 20. Originating Court and Single Judgments

		Was the case a single judgment case?			
		No	Yes-composite or collective judgment	Yes- Single judgment with others only formally concurring	Total
Which court the appeal originated from	Court of Appeal Civil Division	132	25	12	169
	Court of Appeal Criminal Division	12	7	1	20
	High Court	9	2	3	14
	High Court of Justiciary	5	0	0	5

[48]Paterson, *Final Judgment*, n9, p102

	Court of Session	11	3	4	18
	Northern Ireland Court of Appeal	9	0	1	10
	Northern Ireland High Court	1	1	0	2
Total		179	38	21	238

Merging the 'overrule' with the 'reversed in part' column, Table 21 demonstrates that a composite/collective judgment was handed down in 13% of decisions that were overruled (17/130) compared to 12% (13/102) of decisions that were upheld. A single judgment with others formally concurring was used in 7% (9/130) of decisions that were overruled compared to 10% (11/102) of decisions that were upheld. Table 22 pulls the types of single judgment and overrule together and demonstrates that only 20% of judgments overruled (on at least one issue) were single judgments whereas 25% of judgments that were upheld were single judgments. Single judgments, therefore, did not appear to be used as a tool to add weight to a decision to overrule.

It is possible that the general rise in single judgments being issued by the Supreme Court will naturally infiltrate into 'overturn' decisions. The increased use of the composite/ collective style of judgment in the Supreme Court resulted in an increase in the proportion of that *style* of single judgment being used in overturn decisions- 14 out of 17 composite/collective cases that overturned the lower court arose in the Supreme Court's time period. Nevertheless, this is largely in substitution for the 'single judgment with others formally concurring' style with only 2 out of 9 such cases that overturned the lower court arising in the Supreme Court time period. Thus the net effect was that the Appellate Committee issued 10 single judgments that overturned the lower court compared to 16 in the Supreme Court. This 6 case increase could be symptomatic of a gradual increase in the use of single judgments for such purposes, but it is not numerically strong enough to draw any firm conclusions.

Table 21. Overrule of Lower Court and Single Judgments

		Whether the lower court was overruled			Total
		Yes	No	Reversed in part	
Was the case a single judgment case?	No	84	78	20	182
	Yes-composite or collective judgment	14	13	3	30

	Yes- Single judgment with others only formally concurring	8	11	1	20
Total		106	102	24	232

Table 22. Overrule of Lower Court and Single Judgments (dichotomised)

			SINGLE		
			No	Yes	Total
Overrule	Yes	Count	104	26	130
		% within Overrule	80.0%	20.0%	100.0%
	No	Count	78	24	102
		% within Overrule	76.5%	23.5%	100.0%
Total		Count	182	50	232
		% within Overrule	78.4%	21.6%	100.0%

Table 23 demonstrates that there was a slightly higher instance of single judgments being used in cases that overruled the lower court where it was not following precedent (25% compared to 21%) or following final appeal court precedent (16% compared to 12%), however where single judgments were most frequently used was in upholding a lower court following lower court precedent (38% compared to 18%). These results are harder to rationalise. The court, in such scenarios, may wish to add weight to the decision to support a lower court precedent. Further study would be required to see whether this was symptomatic of a general trend rather than an anomaly in the results.

Table 23; Overrule of Lower Court, Lower Court following Precedent and Single Judgment

Does the lower court follow established precedent?			SINGLE		
			No	Yes	Total
No precedent followed	Overrule	Yes	38	13	51
		No	40	11	51
	Total		78	24	102
Yes; precedent set by House of Lords/Supreme Court	Overrule	Yes	32	6	38
		No	22	3	25
	Total		54	9	63
Yes; precedent set by lower	Overrule	Yes	31	7	38

court		No	16	10	26
	Total		47	17	64
Total	Overrule	Yes	101	26	127
		No	78	24	102
	Total		179	50	229

The final way to add weight to a decision would be to increase the panel size that determines the appeal. Table 24 demonstrates that the vast majority of overrule decisions were taken by the standard 5 justice panel. Nevertheless, 12% of all overruled decisions (including reversed in part) (16/129) were overruled by a 7 Justice panel (compared to 3% (4/102) of upheld decisions being upheld by a 7 Justice panel). 5% (6/129) of overruled decisions were overruled by a 9 Justice panel (compared to 6% (6/102) of upheld decisions being upheld by a 9 Justice panel). The 7 Justice panel pattern was not replicated by 9 Justice panels as these enlarged panels were just as likely to be convened in cases that were eventually upheld as overruled. The instances of 9 justice panels were much fewer in the time period, and a study over a longer time period would assist in concluding whether 7 Justice panels overrule the lower court more often than 9 Justice panels. The results returned for 7 Justice panels could be explained in a number of ways. Firstly, that there was a slight tendency for 7 Justice panels to overrule lower courts. Secondly, that the cases that convene a 7 Justice panel tend to be those in which the issues are more finely balanced, complex or where the law (which the lower court may have felt bound by) needs reviewing. Thirdly, a 7 justice panel was convened in cases where it was suspected that overrule may be forthcoming, to add weight to the decision. The latter scenario is unlikely, given the proportion of cases that are still overruled by a 5 Justice panels. The first two reasons are possible, but they don't explain the difference in the results for 9 and 7 Justice panels- aside from the fact that the 9 Justice panel results were affected by low numbers. If the first reason is true and larger panels are more likely to overrule the lower court, then the increased use of these panels in the Supreme Court will impact on relations with the lower courts and may be one of the reasons why the rate of overrule in the Supreme Court is slightly higher than in the Appellate Committee. Nevertheless, the greater propensity of such panels to overrule the lower court may be accepted owing to the increased weight attaching to a larger panel size's decision, particularly where the court is unanimous.

Table 24. Overrule of Lower Court and Panel Size

		Whether the lower court was overruled			
		Yes	No	Reversed in part	Total
panel	3 justices	1	0	0	1
	5 justices	90	92	16	198
	7 justices	12	4	4	20
	9 justices	2	6	4	12
Total		105	102	24	231

The reason for overrule

The frequency of overrule and the judgment style used in cases that overrule a lower court reveals little about the reasons behind the decision to overrule. By the time an appeal reaches the final appeal court, the judicial vote for each party in the lower courts can be even.[49] Certain cases will split both the lower and the final appeal court, with the arguments for each side either being 'evenly balanced'[50] or the issues being especially 'difficult to resolve'.[51] In *Final Appeal* it was noted that division in the court below was one of the criterion used for leave to appeal, partly because any conflict in how the law should be interpreted or applied should be settled by the final appeal court.[52] Alder's more recent, yet more limited, study of one year found that in 1999 only 27% of appeals came from a divided Court of Appeal.[53] The results of this study, shown in Table 25, demonstrate that this is now even lower, with only 12% of cases coming from a divided lower court. The Court of Appeal (Civ), of all the originating courts, was most frequently divided, followed by the Court of Session. The High Court is usually presided over by a single judge and therefore had a 100% unanimity rate. The Court of Appeal (Crim) and the High Court of Justiciary were always unanimous in the time period. Conventionally, the Court of Appeal (Crim) does not provide dissenting and concurring opinions.

[49]Lord Clarke refers to 'the judicial score being two all' in *Farstad Supply AS v Enviroco Limited (Scotland)* [2010] UKSC 18 [4]

[50]*Maco Door and Window Hardware (UK) Limited v HM Revenue and Customs* [2008] UKHL 54; *Chartbrook Limited v Persimmon Homes* [2009] UKHL 38 were cases where the dissenting view in the lower court was preferred.

[51]*R (on the application of E) v The Governing Body of JFS* [2009] UKHL 15 [125] (per Lord Clark), although this was a case where the appeal was dismissed.

[52]Blom-Cooper and Drewry, *Final Appeal,* n1, p134. The authors noted that, 'Of 349 English civil appeals heard by the House of Lords during the period 1952-68 no fewer than 232 (66.5 per cent) involved an element of disagreement below i.e. either a dissenting judgment in the Court of Appeal, or a reversal (complete or partial) of the trial judge's decision.'

[53]J Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20(2) OJLS 221, p226

Table 25. Unanimity of Lower Court by Originating Court

		What the result was in the lower court		
		Unanimous	Divided	Total
Which court the appeal originated from	Court of Appeal Civil Division	135	23	158
	Court of Appeal Criminal Division	20	0	20
	High Court	14	0	14
	High Court of Justiciary	5	0	5
	Court of Session	14	4	18
	Northern Ireland Court of Appeal	9	1	10
	Northern Ireland High Court	1	1	2
Total		198	29	227

Table 26 reveals that in the vast majority of cases the lower court was unanimous therefore the vast majority of cases that were overruled were unanimous judgments (87/104).[54] Nevertheless, counting 'reversed in part' and 'overrule' together, only 53% (108/201) of unanimous lower court judgments were overruled compared to 69% (20/29) of divided lower court judgments. Table 27 confirms that when the lower court was divided it was almost twice as likely to be overruled (58.6%:31%) as upheld and the inclusion of reversed in part figures only increased this ratio. Thus a divided lower court, although relatively uncommon, increased the chance of overrule. Indeed, Paterson's interviews with the Lord Justices in the Court of Appeal revealed that often a dissenting opinion in the Court of Appeal will be written as a way of initiating a conversation with the final appeal court on that point.[55]

Table 26. Overrule of Lower Court and Unanimity of Lower Court

		What the result was in the lower court		
		Unanimous	Divided	Total
Whether the lower court was overruled	Yes	87	17	104
	No	93	9	102

[54]Alder found that 66% of all reversals involved a unanimous Court of Appeal; Alder, 'Dissents in Courts of Last Resort', n53, p226-227

[55]Paterson, *Final Judgment*, n9, p210

	Reversed in part	21	3	24
Total		201	29	230

Table 27. Overrule of Lower Court and Lower Court Unanimity (%)

		Whether the lower court was overruled			Total
		Yes	No	Reversed in part	
What the result was in the lower court	Unanimous	43.3%	46.3%	10.4%	100.0%
	Divided	58.6%	31.0%	10.3%	100.0%
Total		45.2%	44.3%	10.4%	100.0%

Final Appeal also found the Court of Appeal more likely to be overruled when it was divided[56] and that the Law Lords could be encouraged to reverse the lower court where they had the support of a judge below or if it was a hard case.[57] Nevertheless, when Blom-Cooper and Drewry attempted to measure the extent to which the Appellate Committee departed from the line of reasoning adopted in the lower court, a task which they admitted was problematic given the difficulties in ascertaining the *ratio decendi* in any case, their 'subjective impression' was that the Appellate Committee hardly ever departed from the approach of the lower court.[58] The authors found the instances where the two courts clashed based on 'principle' to be infrequent and instead it was more common to have differences in 'emphasis' i.e. in terms of construction or interpretation.[59]

Examples were evident in the time period where the lower court was found to have applied the wrong legal test and thus was wrong in principle. In *Chief Constable of Hertfordshire Police v Van Colle*,[60] the Court of Appeal had lowered the *Osman* test used in A2 ECHR cases by placing too much significance on the respondents' status as a witness; *In re E*[61] the appeal was upheld however it was noted that the *Smith* test used by the lower court was not as intense as the proportionality test that the police actions needed to satisfy; in *Agbaje v Akinnoye- Agbaje*,[62] the Court of Appeal incorrectly applied the traditional *forum non convenies* principles; in *HJ (Iran) and HT (Cameroon) v Secretary of*

[56]The rate of overturn for a unanimous Court of Appeal was 35% compared to 47.6% where it was divided. In Scottish cases, the rate of overturn was 45.5% for a unanimous Court of Session and 50% for a divided court. See Blom-Cooper and Drewry, *Final Appeal,* n1, p190.
[57]Blom-Cooper and Drewry, *Final Appeal,* n1, p190
[58]Blom-Cooper and Drewry, *Final Appeal,* n1, p247
[59]Blom-Cooper and Drewry, *Final Appeal,* n1, p247
[60][2008] UKHL 50 [36]
[61][2008] UKHL 66 [54]
[62][2010] UKSC 13 [76]

State for the Home Department,[63] the Court of Appeal misread High Court of Australian authority and in so doing formulated a test that would refuse asylum if it would be reasonable to expect the applicant to be discreet on return to their home country. The Supreme Court found it inappropriate to 'expect' a person to live discreetly.

However, as *Final Appeal* correctly identified, overrule was often owing to a difference in 'emphasis' or weighting.[64] Such an approach can add a degree of indeterminacy to the grounds of appeal. An example was provided in determining what was 'in the interests of justice'. Lord Dyson stated that:

> The interests of justice is not a hard-edged concept. A decision as to what the interests of justice requires calls for an exercise of judgment in which a number of relevant factors have to be taken into account and weighed in the balance.[65]

The appeal was upheld, however Lord Dyson admitted that differently constituted courts may 'legitimately' put different weighting on certain factors. Nevertheless, he downplayed the significance of this in that the final appeal court would be 'slow to allow an appeal on the ground that the decision-maker failed to place sufficient weight on a relevant factor which it rightly took into account'.[66] That being so, weighting seemed to play a part in overturning the lower court in *R (on the application of Ahmed) v Mayor and the Burgesses of London*,[67] where Lord Neuberger suspected perhaps 'unfairly' that the lower court had had too much regard to the 'circumstances and requirements' of the individual applicant as opposed to the validity of the housing scheme as a whole.[68] Overrule also occurred as a result of overemphasis by the majority in the lower court of a particular word in a statute.[69]

It is inherent in the relationship between two legal institutions that they may disagree on the correct legal test to be applied or the weighting to be accorded to certain factors in making a decision. The study also attempted to measure whether the final appeal court was more likely to overrule the lower court when the matter touched on one of its other institutional relationships such as that with Parliament, the executive or the ECtHR.

Statutory misinterpretation was found to be a reason for overrule in the time period. For instance, the Court of Appeal was found to have erred by interpreting two separate defences under s57(2)

[63] [2010] UKSC 31
[64] *Thorner v Majors* [2009] UKHL 18 [60] (per Lord Walker)
[65] *R v Maxwell* [2010] UKSC 48 [19]
[66] *Maxwell,* n65 [35-36]
[67] [2009] UKHL 14
[68] *R(Ahmed),* n67 [60]
[69] See *Majorstake Limited v Curtis* [2008] UKHL 10 [17]

and s58(3) in the Terrorism Act 2000 as if they were substantially the same defence, despite the fact that different language was used and 'Parliament had deliberately framed different defences to charges under the two sections.'[70] In *R (on the application of A) v London Borough of Croydon*,[71] the Court of Appeal incorrectly conflated the question of whether a person was a 'child' with whether they were a 'child in need' under the Children Act 1989, where the statute was found by the Supreme Court to draw a clear distinction.

The final appeal court acknowledged when the issue lay with the statute itself rather than the lower court's interpretation of it. Thus, in *R (on the application of Noone) v The Governor of HMP Drake Hall*,[72] the transitional provisions between two statutory regimes were unclear. Tribute was paid to a succession of Court of Appeal judgments that 'sought to grapple with the intractable problems of construction thrown up by these ill-conceived transitional provisions'.[73] In the end, the Supreme Court had to purposively interpret the provisions to reach its decision and in so doing, overturned the lower court.

The final appeal court was also careful to ensure that lower court statutory interpretation did not result in impermissible judicial legislation. In *Transport for London v Spirerose Limited*,[74] the Court of Appeal appeared to include an assumption for the purposes of valuation of land that was not one of the statutory assumptions listed in the Land Compensation Act 1961. Although Lord Neuberger acknowledged that this was an attempt to address an anomaly and act out of fairness, in his opinion it amounted to 'judicial legislation' and 'inserted a judge-made assumption into a statutory formula, which seems to be complete and self-contained.'[75] In *Secretary of State for Environment, Food and Rural Affairs v Meier*,[76] the lower court was incorrect to grant the Secretary of State a wider possession order to sites with uninterrupted possession but where there was a danger of future occupation by travellers. Lord Neuberger firmly stated that the solution to travellers moving to the next piece of land needed to come from legislation, '… however desirable it is to fashion or develop a remedy to meet a particular problem, courts have to act within the law … Judges are not legislators.'[77] The final appeal court's loyalty to the statutory wording and statutory scheme of Parliament as well as its deference to the better position of Parliament to conduct necessary

[70] *R v G* [2009] UKHL 13 [72]
[71] [2009] UKSC 8
[72] [2010] UKSC 30
[73] *Noone*, n72, [44]
[74] [2009] UKHL 44
[75] *TFL,* n74 [41] and [50]
[76] [2009] UKSC 11
[77] *Meier,* n76 [59]

statutory reform, as outlined in Chapter 1, appeared to play a part in the overturn of the lower courts in the time period.

The quantitative data measured whether the lower court was overturned more in cases that involved the executive. As can be seen from Table 28 below, there was a tendency for judgments involving the executive to be upheld and conversely for judgments not involving the executive to be overruled. Once the 'reversed in part' and 'overrule' columns were conflated, overrule in cases involving the executive was 50.7% and overrule in cases not involving the executive was 57.8%. These figures indicate two points: Firstly that more cases were overruled than upheld and secondly, that slightly more cases not involving the executive were overruled.

Table 28. Overrule of Lower Court and Executive Involvement

	Whether the lower court was overruled			
	Yes	No	Reversed in part	Total
No involvement	75	65	14	154
Involvement	30	36	7	73
Total	105	101	21	227

At a very general level, the statistics appear to indicate that the accuracy of the lower court's judgment and the subsequent ability for the final appeal court to uphold the lower court's decision was stronger in cases where the executive was a party to the case. This is obviously a very superficial conclusion as a decision can be upheld but nonetheless be based on substantially different reasoning. As *Final Appeal* recognised this is a much harder measurement to record and the extent to which this is true of these figures would have to be the subject of further study, where the lower court judgments are also reviewed in full. Working on the assumption that the majority of these instances approved the lower court's reasoning as well as its decision, there could be several reasons behind this. Firstly, the lower court may have produced fuller and more detailed explanatory reasoning in cases that involved the executive. Secondly, the final appeal court recognised when lower court judges were recognised experts in their field or closer to the facts and therefore tended to defer more to the lower court's decision. This may have been particularly true of immigration cases, where the executive was often a party. Thirdly, the final appeal court wished to display a united judicial platform to strengthen the judicial viewpoint and leave the judgment less open to attack by the executive. This may have been particularly important in cases that found against the executive. Nevertheless, Table 29 demonstrates that overrule was actually more common when the

executive was unsuccessful, reducing the plausibility of the theory that the courts tried to form a united front when finding against the executive.

Table 29. Overrule of Lower Court and Executive Success (%)

		Whether the lower court was overruled			Total
		Yes	No	Reversed in part	
Whether the case involved a finding against the executive	Not Applicable	48.7%	42.2%	9.1%	100.0%
	Yes	55.6%	36.1%	8.3%	100.0%
	No	27.0%	62.2%	10.8%	100.0%
Total		46.3%	44.5%	9.3%	100.0%

Although, the lower court was more likely to be overruled in non-executive cases, when the final appeal court found against the executive this, more often than not, resulted in an overrule of the lower court and conversely a decision to uphold the executive, more often than not, resulted in the lower court being upheld. This pattern suggests that the lower courts were more cautious at finding against the executive and so when the Supreme Court was minded to do so, it tended to differ from the decision of the lower court. The results also suggest a degree of deference to the executive by the lower courts in the time period.

The lower courts may have felt more comfortable following established precedent in cases that involved the executive. The involvement of the executive, however, did not appear to affect whether the lower court followed precedent or not. Table 30 shows that the lower court followed precedent in 39/73 (53%) of cases where there was executive involvement compared to 85/152 (54%) of cases where there was no executive involvement.

Table 30. Lower Court following Precedent and Executive Involvement

	Does the lower court follow established precedent?			
	No precedent followed	Yes; precedent set by House of Lords/Supreme Court	Yes; precedent set by lower court	Total
No involvement	67	38	47	152
Involvement	34	22	17	73
Total	101	60	64	225

Table 31 combines following precedent, executive involvement and overrule of the lower court. When the executive was not involved, the lower court was overruled in 55% (37/67) of cases where it was not following precedent, in 58% (22/38) of cases where it was following final court precedent and in 59% (28/47) of cases where it was following lower court precedent. By contrast, where the executive was involved, the lower court was overruled in 41% (14/34) of cases where it was not following precedent, in 59% (13/22) of decisions where it was following final appeal court precedent and in 59% (10/17) decisions where it was following lower court precedent. As such, the only difference that executive involvement appeared to make to the rate of overrule of the lower court, was in lowering the rate of overrule from 55% to 41% in unprecedented situations. This suggests that the lower court was overruled less in cases that involved the executive because the final appeal court was more open to the lower court's 'law-making' in the context of decisions involving the executive. 'Judicial law-making' is discussed further below, however suffice to say it strengthens a decision taken without precedent, particularly in cases that involved the executive, where two courts agreed on the legal position.

Table 31. Overrule of Lower Court, Lower Court following Precedent and Executive Involvement

				Overrule		
Does the lower court follow established precedent?				Yes	No	Total
No precedent followed	Exec_Involvement	No involvement	Count	37	30	67
			% within Exec_Involvement	55.2%	44.8%	100.0%
			% within Overrule	72.5%	60.0%	66.3%
			% of Total	36.6%	29.7%	66.3%
		Involvement	Count	14	20	34
			% within Exec_Involvement	41.2%	58.8%	100.0%
			% within Overrule	27.5%	40.0%	33.7%
			% of Total	13.9%	19.8%	33.7%
	Total		Count	51	50	101
			% within Exec_Involvement	50.5%	49.5%	100.0%
			% within Overrule	100.0%	100.0%	100.0%
			% of Total	50.5%	49.5%	100.0%
Yes; precedent set by House of Lords/Supreme Court	Exec_Involvement	No involvement	Count	22	16	38
			% within Exec_Involvement	57.9%	42.1%	100.0%
			% within Overrule	62.9%	64.0%	63.3%

			% of Total	36.7%	26.7%	63.3%
		Involvement	Count	13	9	22
			% within Exec_Involvement	59.1%	40.9%	100.0%
			% within Overrule	37.1%	36.0%	36.7%
			% of Total	21.7%	15.0%	36.7%
	Total		Count	35	25	60
			% within Exec_Involvement	58.3%	41.7%	100.0%
			% within Overrule	100.0%	100.0%	100.0%
			% of Total	58.3%	41.7%	100.0%
Yes; precedent set by lower court	Exec_Involvement	No involvement	Count	28	19	47
			% within Exec_Involvement	59.6%	40.4%	100.0%
			% within Overrule	73.7%	73.1%	73.4%
			% of Total	43.8%	29.7%	73.4%
		Involvement	Count	10	7	17
			% within Exec_Involvement	58.8%	41.2%	100.0%
			% within Overrule	26.3%	26.9%	26.6%
			% of Total	15.6%	10.9%	26.6%
	Total		Count	38	26	64
			% within Exec_Involvement	59.4%	40.6%	100.0%
			% within Overrule	100.0%	100.0%	100.0%
			% of Total	59.4%	40.6%	100.0%
Total	Exec_Involvement	No involvement	Count	87	65	152
			% within Exec_Involvement	57.2%	42.8%	100.0%
			% within Overrule	70.2%	64.4%	67.6%
			% of Total	38.7%	28.9%	67.6%
		Involvement	Count	37	36	73
			% within Exec_Involvement	50.7%	49.3%	100.0%
			% within Overrule	29.8%	35.6%	32.4%
			% of Total	16.4%	16.0%	32.4%
	Total		Count	124	101	225
			% within Exec_Involvement	55.1%	44.9%	100.0%
			% within Overrule	100.0%	100.0%	100.0%

	% of Total	55.1%	44.9%	100.0%

The involvement of the executive clearly had an impact on the overrule statistics for the lower courts. The same was true when the jurisprudence of the ECtHR was considered. Table 32 shows that only around 45% of cases dealing with human rights were overruled in some way compared to between 50-60% of cases dealing with other subject matters.

Table 32. Overrule of Lower Court by Subject Matter

		Whether the lower court was overruled			
		Yes	No	Reversed in part	Total
Case_Type	HR	12	23	7	42
	DCAPL	55	42	8	105
	LOPL	29	25	7	61
	INT	10	12	2	24
Total		106	102	24	232

The data suggests that the lower court's strongest record in terms of avoiding overrule was in the human rights field. Table 33 also reveals that the percentage of cases overruled in full decreased as the number of Strasbourg citations recorded in the final appeal court judgment increased. The same was not true of reversed in part judgments, where the percentage of cases reversed in part appeared to increase as the number of Strasbourg citations increased. This suggests that in cases where a lot of Strasbourg jurisprudence was considered by the final appeal court, the lower court was less likely to be overruled in full and instead was more likely to be overruled in part or not at all. In other words, the lower court reading of Convention requirements was more likely to be correct than incorrect.

Table 33. Overrule of Lower Court and Number of Strasbourg Citations

		Whether the lower court was overruled			Total
		Yes	No	Reversed in part	
Stras_citations	0	75	66	12	153
	1-9	17	19	6	42
	10+	14	17	6	37
Total		106	102	24	232

Where the executive was a party, the lower court was found to be overruled less when acting without precedent. However, in human rights cases, the lower courts were more often than not applying some kind of precedent and doing so correctly. Table 34 demonstrates that the lower court followed precedent set by the final appeal court in 54% of cases involving human rights and precedent as a whole in 71% of cases. The low overrule rate suggests that the lower court was applying those precedents correctly and that the articulation of the law through precedent was very strong in the human rights field. This is entirely proper, given the importance of clearly articulating the law in relation to an individual's rights and owing to the support of the ECtHR jurisprudence to facilitate the final appeal court in developing jurisprudence under the HRA and the lower court in interpreting the domestic precedent.

Table 34. Lower Court following Precedent by Subject Matter

		Does the lower court follow established precedent?			
		No precedent followed	Yes; precedent set by House of Lords/Supreme Court	Yes; precedent set by lower court	Total
	HR	12	22	7	41
	DCAPL	43	28	34	105
	LOPL	35	8	17	60
	INT	12	5	6	23
Total		102	63	64	229

The findings above are supported by the results in Table 35. The lower court followed precedent in 42/61 instances (69%) where Strasbourg jurisprudence had an influence on the case compared to 85/168 instances (51%) where Strasbourg jurisprudence was not considered. This was statistically significant.[78]

Table 35. Lower Court following Precedent and consideration of the Convention

		Does the lower court follow established precedent?			
		No precedent followed	Yes; precedent set by House of Lords/Supreme Court	Yes; precedent set by lower court	Total
Strasbourg matter	No	83	35	50	168

[78] $\chi^2_{(2)} = 14.13$, $p = 0.001$

	Yes	19	28	14	61
Total		102	63	64	229

That is not to say that the lower court was never overruled when a Convention right was at stake. Even where the two courts agreed that a Convention right had been infringed, as seen in Chapter 4, the mechanics of the HRA are such that there are two possible avenues to achieving Convention compatibility. Overturn occurred in the time period, where the lower court resolved the issue using s3 of the HRA, whereas the final appeal court preferred to issue a declaration of incompatibility under s4.[79]

Clearly, institutional relationships with Parliament, the executive or significantly the ECtHR had a direct impact on the rate of overrule of the lower court. The lower court appeared more successful at applying precedent in the human rights field, suggesting that domestic precedent is perhaps stronger in the human rights field. This latter point is evident in the next section, which reviews the data more closely in relation to the involvement of precedent and how that affected institutional relationships and the administrative efficiency of the court in the time period.

Precedent

The Role of Precedent

The common law doctrine of *stare decisis*, '… compels judges to synthesise present decisions (or at least articulate the reasons for such decisions) out of the accumulated wisdom (or folly) of their judicial forbears.'[80] It is complemented by the limited circumstances in which the final appeal court may depart from its own authority under the *1966 Practice Statement*.[81] Each has been retained in the Supreme Court.[82] In this sense, precedent is an important institutional link between the Supreme Court and the Appellate Committee. Precedent ensures a degree of fairness, certainty, predictability, efficiency and stability in the development of the law,[83] with a wholescale departure from precedent

[79] *R (on the application of Wright) v Secretary of State for Health* [2009] UKHL 3
[80] Blom-Cooper and Drewry, *Final Appeal,* n1, p65
[81] *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234.
[82] As confirmed in *Austin v London Borough of Southwark* [2010] UKSC 28 [24-25] (per Lord Hope). Counsel are now requested to make clear in advance of the hearing, via a separate paragraph in their heads of argument, whether they intend to ask the court to depart from its own precedent. UKSC PD 6; The Appeal Hearing at 6.3.4.
[83] N Duxbury, *The Nature and Authority of Precedent* (CUP, Cambridge, 2008), p36; F Schauer, *Precedent* [1986] 39 Stan L.Rev 571, 574, p595-602

being regarded by some as damaging to the rule of law.[84] Nevertheless, it is clear that a common law system cannot remain stagnant and that some legal development is necessary to keep pace with societal demands[85] or to adhere to the requirements of Convention jurisprudence.[86] Thus precedent is not strictly binding, however it has the capacity to influence and constrain a decision-maker by requiring them to reason through their decision-making with reference to past authority, be it through applying, distinguishing or departing from such authority.[87]

Precedent forms an important institutional link between the final appeal court and the lower courts. The hierarchical court structure- including the final appeal court's supervisory role over the legal system- is facilitated by precedent, which enables the final appeal court to correct any errors that may be appearing in an area of law.[88] In this way, precedent can be an important consideration in the decision to grant leave to appeal. For instance, the greater willingness of the Appellate Committee to grant leave to appeal in human rights cases following the implementation of the HRA appears to have been in 'recognition of a responsibility to make sense of the new legal framework and to give lower courts guidance on how to interpret and apply it.'[89] Furthermore, the relatively few occasions where the Court of Appeal grants leave to appeal is often in recognition of the need for the final appeal court to clarify a precedent.[90]

Precedent can also be the root cause of an overrule, such as when the lower court is deemed to have departed from one of its own precedents in an unwarranted fashion[91] or when the lower court

[84]See Lord Bingham, 'The Rule of Law', (2007) 66 CLJ 67, 71; 'It is one thing to alter the law's direction of travel by a few degrees, quite another to set it off in a different direction.'
[85]See *R v R* [1991] UKHL 12
[86]See *Manchester City Council v Pinnock* [2010] UKSC 45
[87]N Duxbury, *The Nature and Authority of Precedent*, n83, p109-112
[88]See *In re B* [2008] UKHL 35 [64] where Lady Hale took the opportunity to silence misconceptions of the standard of proof required to establish that a child 'is likely to suffer significant harm' under s31(2) Children Act 1989. There was room for misinterpretation of Lord Nicholls sentiments in *reH (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563. Lady Hale followed *reH,* however in relation to the misinterpretation she stated 'it is time for us to loosen its grip and give it its quietus'.
[89]Shah and Poole, 'The impact of the Human Rights Act on the House of Lords' [2009] PL 347, 360
[90]The Court of Appeal granted leave to appeal in *Secretary of State for the Home Department v AF* [2009] UKHL 28. Lord Phillips notes that the Court of Appeal added a postscript to their judgment explaining the uncertainty over whether they had interpreted the majority judgment in *MB* correctly. Although this point became academic, Lord Phillips still confirmed, for legal certainty, that the Court of Appeal's interpretation was correct. See [37]. Paterson cites *Jones v Kaney* [2011] UKSC 13 as an example of another case that arose in the time period where leave was granted to resolve the issues left over from *Stack v Dowden* [2007] UKHL 17. See Paterson, *Final Judgment*, n9, p69
[91]In *R v Clarke* [2008] UKHL 8, the lower court followed *R v Ashton* [2006] EWCA Crim 794 which in turn was an unwarranted departure from *R v Morais* [1988] 3 All ER 161.

misinterprets previous opinions of the final appeal court, including the test to be used,[92] the effect of the decision,[93] or perhaps focusses on the wrong speech and misunderstands that speech.[94]

Precedent is in many ways an imperfect method of institutional communication. At its best, it allows the lower courts to use a past opinion with analogous facts to predict more accurately how the final appeal court will determine a decision. At its worst, it can complicate the decision-making process through the search to find an analogous precedent and the need to somehow categorise past cases and assimilate their reasoning to the current case.[95] Furthermore, it can facilitate 'suboptimal' decision-making in the instant case for the benefit of the system of precedent as a whole.[96] The relative weighting and authority to afford a precedent is often unclear. Precedents lack the authority of statutory wording but can incorrectly assume such a level of authority where they are characterised as such by canonical words or by the status of the judge that delivered it.[97] Lord Reid regarded this as 'the most dangerous pitfall'.[98] It was evident in the time period in *R v Islam*,[99] where Toulson LJ had noted that,

> Perhaps because of the high authority of Lord Bingham, the passage quoted above from his judgment in *Dore* appears to have been treated in later cases as if the words were statutory and applied in a very different context from that which Lord Bingham was considering.[100]

Lord Mance warned of the different context that Lord Bingham made the *obiter* statement and that it would not be correct to attribute to Parliament knowledge of Lord Bingham's words spoken in 1997 to determine what it meant by 'market value' in the 2002 Proceeds of Crime Act.[101]

Precedent is clearly a central institutional link between the final appeal court and the lower courts, yet it is full of complexity. The quantitative data below examined each lower court's reliance on precedent in the time period and whether following precedent achieved a level of stability and certainty by reducing the rate of overrule. Furthermore, the data sought to measure whether the

[92]See *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64 [53] (per Lord Carswell)
[93]In *Gray v Thames Trains* [2009] UKHL 33 [47-49], the Court of Appeal failed to recognise that they were precluded from awarding damages on a counterfactual basis by the Appellate Committee decision in *Jobling v Associated Dairies ltd* [1982] AC 794.
[94]See *In reB (A child)* [2009] UKSC 5 where the lower court focussed on Lord Nicholls' speech in *Re G (Children)* [2006] UKHL 43 rather than Lady Hale's leading speech. The lower court misread the context in which Lord Nicholls' words were spoken and as a consequence the fact that the importance of biological parents rearing the child still had to be subject to the *paramount* consideration of the child's welfare. See [26] and [34].
[95]See Schauer, 'Precedent', n83, 579
[96]Schauer, 'Precedent', n83, 589
[97]N Duxbury, *The Nature and Authority of Precedent*, n83, p23
[98]Lord Reid, 'The Judge as Law Maker' (1972) 12 JSPLT 22, 26
[99][2009] UKHL 30
[100]*R v Islam* [2008] EWCA Crim 1740 [22]

lower court's application of precedent was in fact more 'efficient' and allowed the final appeal court to consider the case and deliver its judgment more expeditiously. As outlined in the Methodology Chapter, the coding in this area was subjective and an overall impression was formed by the author as to whether the lower court was following precedent. As such the conclusions reached are only very tentative.

Quantitative Data on Precedent

Tables 36 and 37 together with Figures 6 and 7 display the differences between courts and sessions in terms of whether the lower court was following precedent. There was a discernible amount of fluctuation between both courts and sessions, with the cases arising in the Appellate Committee sessions more commonly following some type of precedent than in the Supreme Court Sessions (60% of cases compared to 49% of cases in the Supreme Court). This suggests that in the Supreme Court, the lower court was more often 'law-making' (a point returned to further below) and this could be one of the reasons for the higher rate of overrule in the Supreme Court compared to the Appellate Committee. The fluctuation recorded between court and session was not statistically significant.[102]

Table 36. Lower Court following Precedent by Court

	Does the lower court follow established precedent?			
	No precedent followed	Yes; precedent set by House of Lords/Supreme Court	Yes; precedent set by lower court	Total
House of Lords	49	35	40	124
Supreme Court	53	28	24	105
Total	102	63	64	229

[101] *Islam,* n99 [43] (per L.Mance)
[102] HL v SC, $X^2(2) = 3.38$, $p = 0.18$; by Session, $X^2(6) = 3.89$, $p = 0.69$

Table 37. Lower Court following Precedent by Session

		No precedent followed	Yes; precedent set by House of Lords/Supreme Court	Yes; precedent set by lower court	Total
	HL 2007-2008	29	21	26	76
	HL 2008-2009	20	14	14	48
	SC 2009-2010	24	13	12	49
	SC 2010-2011	29	15	12	56
Total		102	63	64	229

Figure 4. Bar Chart showing Lower Court following Precedent by Court

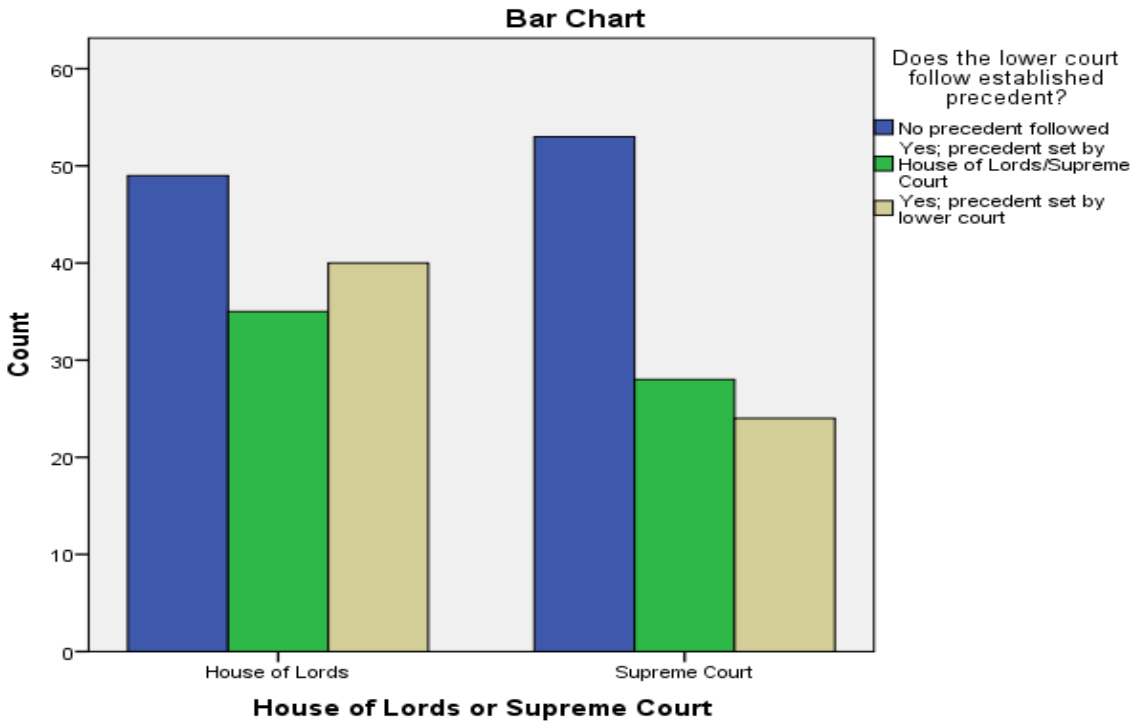
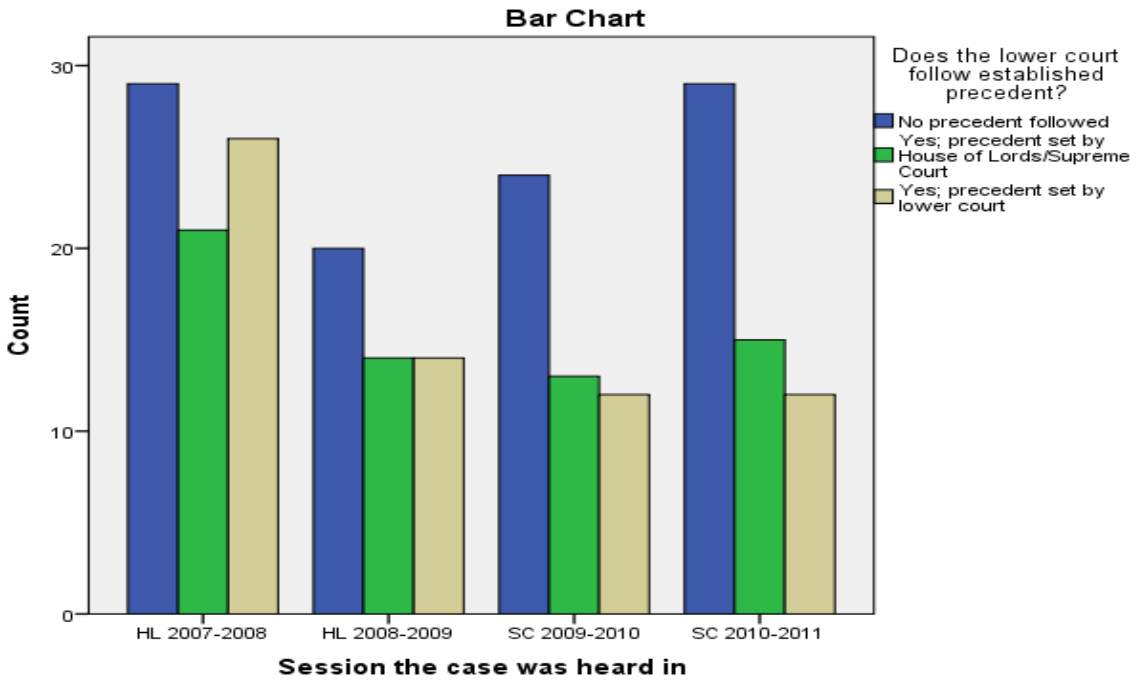


Figure 5. Bar Chart of Lower Court following Precedent by Session



With the exception of the Court of Appeal (Civ) and the Northern Ireland High Court, Table 38 demonstrates there were few differences in rates of following precedent between the various different courts. Each court, with the exception of the aforementioned courts, followed some kind of precedent more often than not, with the High Court of Justiciary and the Northern Ireland Court of Appeal having the highest percentage (80% each) of cases that followed precedent. As only 2 cases arose in the Northern Ireland High Court no conclusions can be drawn from the fact that neither of its cases followed precedent. Interestingly, the Court of Appeal (Civ), which dominated the workload of the court had an almost 50/50 split between cases that followed precedent and cases that did not. The difference between this court and the other courts was not, however, statistically significant.[103]

[103] χ^2 (12) = 11.79, p = 0.46

Table 38. Lower Court following Precedent by Originating Court

Which court the appeal originated from		Does the lower court follow established precedent?			
		No precedent followed	Yes; precedent set by House of Lords/Supreme Court	Yes; precedent set by lower court	Total
	Court of Appeal Civil Division	77	43	37	157
	Court of Appeal Criminal Division	7	6	7	20
	High Court	5	5	4	14
	High Court of Justiciary	1	1	3	5
	Court of Session	8	4	6	18
	Northern Ireland Court of Appeal	2	3	5	10
	Northern Ireland High Court	2	0	0	2
Total		102	62	62	226

Table 39 demonstrates that, with the exception of the Court of Appeal (Civ), there was a great deal of fluctuation between the different lower courts rate of following precedent as between the Appellate Committee and Supreme Court sessions.[104] This suggests that the sample period was too short to even out the natural fluctuations depending on the specific caseload in any given year and so again the results in this section should be treated with a degree of caution.

Table 39. Lower Court following Precedent by Originating Court and by Final Appeal Court

House of Lords or Supreme Court				
	No precedent followed	Yes; precedent set by House of	Yes; precedent set by	Total

[104]% Precedent to No precedent Ratio for HL vs SC for each court; CA Civ (53;47 and 49;51), CA Crim (80;20 and 20;80), EWHC (70;30 and 50;50), CoS (78; 22 and 33;67) NICA (75;25 and 100;0) and NIHC (0;100 and 0;0).

				Lords/Supreme Court	lower court	
House of Lords	Which court the appeal originated from	Court of Appeal Civil Division	37	22	20	79
		Court of Appeal Criminal Division	3	5	7	15
		High Court	3	4	3	10
		Court of Session	2	2	5	9
		Northern Ireland Court of Appeal	2	2	4	8
		Northern Ireland High Court	2	0	0	2
	Total		49	35	39	123
Supreme Court	Which court the appeal originated from	Court of Appeal Civil Division	40	21	17	78
		Court of Appeal Criminal Division	4	1	0	5
		High Court	2	1	1	4
		High Court of Justiciary	1	1	3	5
		Court of Session	6	2	1	9
		Northern Ireland Court of Appeal	0	1	1	2
	Total		53	27	23	103

Overrule of precedent occurred in 12 cases in *Final Appeal*, although a 'substantially different approach' short of overrule was taken in over 100 appeals.[105] This led to the conclusion that, 'while different does not mean better, a figure of this size supports our view that the House of Lords earns its keep by acting as substantially more than a 'rubber stamp.'[106] Table 40 demonstrates that of all the cases overruled in full, 58% followed some kind of precedent. These results were not, however, statistically significant.[107] The results were similar when 'reversed in part' numbers were included in 'overrule', with 60% of cases overturned following some form of precedent. This suggests that the final appeal court was more likely to take issue with the way that a lower court read or applied a precedent, or take issue with the precedent itself than with the lower court's law-making, and seems

[105]Blom-Cooper and Drewry, *Final Appeal,* n1, p247. Note that this figure only related to appeals allowed on the basis that a previous authority was wrongly decided rather than all of the authorities that were overruled or strongly distinguished.
[106]Blom-Cooper and Drewry, *Final Appeal,* n1, p247
[107]$X^2(4) = 4.85$, $p = 0.303$

to go against the initial thoughts that the higher overrule rate in the Supreme Court could be because the lower court was more often deemed to be law-making in the Supreme Court period.

Overruling a lower court that believes it is following precedent is potentially more controversial than overruling a lower court that is acting without precedent, as precedent following should create *more* stability in the law. Table 41 tracks through whether the final appeal court was more likely to be divided in its decision to overrule a lower court following precedent. Of 102 cases where no precedent was followed by the lower court, 50% were overruled in some way and of these overrules, 20% were divided. Of the 63 cases following final appeal court precedent, 60% were overruled and of these overrules, 18% were divided. Finally of the 63 cases where precedent was set by the lower court, 59% were overruled and of these only 8% were divided. These statistics reflect the findings above in 'Table 23; Overrule of Lower Court, Lower Court following Precedent and Single Judgment,' by showing that the final appeal court garnered the most unanimity when overruling a lower court that followed its own precedent (and was more likely to provide a single judgment in such cases), whereas division was more common either when overruling a lower court that acted in an unprecedented manner or a lower court that misapplied final appeal court authority. Again, these results appear counterintuitive but, as with single judgments, they could indicate several things. Firstly, that final appeal court judges are more likely to disagree over the way that the lower court has 'made law' in an area. Secondly, that institutional politics may mean that there is more sensitivity attached to overruling a lower court precedent than a final appeal court precedent. Thus, the judges seek to add weight to the decision to overrule that lower court precedent, or the way it has been applied, by garnering more unanimity. Again, further study is needed to look at the exact circumstances of each case and whether it was the precedent itself that the final appeal court disapproved of, its application to the context, or indeed the way that it had been applied by the lower courts.[108]

Table 40. Lower Court following Precedent and Overrule of Lower Court

		Whether the lower court was overruled			Total
		Yes	No	Reversed in part	
Does the lower court follow established precedent?	No precedent followed	44	51	7	102
	Yes; precedent set by House of Lords/Supreme Court	28	25	10	63

[108]The Appellate Committee may decide that a precedent followed by the lower court is not in fact 'determinative' in the case before them; In *reP (Northern Ireland)* [2008] UKHL 38 [48] (per Lord Hope).

	Yes; precedent set by lower court	32	26	6	64
Total		104	102	23	229

Table 41. Lower Court following Precedent, Lower Court Unanimity and Overrule of Lower Court

Does the lower court follow established precedent?			Overrule		Total
			Yes	No	
No precedent followed	What the result was in the lower court	Unanimous	41	43	84
		Divided	10	8	18
	Total		51	51	102
Yes; precedent set by House of Lords/Supreme Court	What the result was in the lower court	Unanimous	31	24	55
		Divided	7	1	8
	Total		38	25	63
Yes; precedent set by lower court	What the result was in the lower court	Unanimous	34	26	60
		Divided	3	0	3
	Total		37	26	63
Total	What the result was in the lower court	Unanimous	106	93	199
		Divided	20	9	29
	Total		126	102	228

On the whole, these results suggest that the final appeal court was more likely to assert its authority to either overrule precedent or ensure that existing precedent was applied correctly than to challenge the reasoning of the lower courts acting in an unprecedented manner. This demonstrates the importance that the final appeal court attaches to judiciously guarding the operation of the system of precedent and correcting errors where the need arises. At the same time, it evidences the desire to maintain relations with lower courts by not too readily overruling their independent reasoning unless there is good reason for doing so. That said, the doctrine of precedent is justified on the basis of certainty, stability and predictability and institutional communication through precedent was perhaps not as smooth as it should have been in the transitional period. Where the final appeal court has already considered a matter, the role of the lower court should be easier as it can follow the guidance provided by the precedent. The results suggest a problem with system of precedent either in the clarity and reasoning of the precedents themselves, or in the lower courts' ability to identify or apply the correct precedent to analogous circumstances. The Supreme Court had the slightly higher rate of overturn of the lower courts in the years studied and a way of

addressing this going forward, would be to improve the utility of precedent. A more focussed study would be required to pinpoint exactly where the failings in lower court use of precedent occurred so that more specific recommendations could be made on how the system of precedent could be improved. For instance, the Supreme Court may need to clarify the reasoning behind cases further to enable precedents to be applied more easily.[109] What can be said is that the lower courts were more successful at applying precedent in the human rights field and, in Chapter 1, there was found to be a significantly higher number of concurring opinions and citations in such cases. As such, concurring opinions may aid the *reasoning* process and thus actually help to *clarify* the judgment for the lower court.[110]

Finally, the quantitative data examined whether the involvement of precedent made decision-making more efficient in the time period. Table 42 demonstrates that the final appeal court hearing was longer when the lower court followed some form of precedent, although not to a significant extent.[111] This suggests that extra time was taken to discuss the nature of those precedents and to consider different perspectives on how to interpret and apply those precedents.[112] That said, as far as judgment gap was concerned, Table 43 demonstrates that the Justices appeared to deliver judgment in a quicker period of time where some form of precedent was followed by the lower court than where no precedent was followed. These differences were again not statistically significant.[113] Nevertheless, the results suggest that judgments were simpler to write where the situation had precedent and judges could draw upon the insights of their forbears. As Table 44 demonstrates, the quicker time taken to write the judgment was not because judgments that followed precedent were necessarily shorter in length, with judgments following final appeal court authority being the longest. A statistically significant difference in judgment length was found between judgments where the lower court followed final appeal court authority as compared to judgments where the lower court followed its own authority.[114] This finding, at first, seems counter-intuitive; however, it supports the analysis above that overrule of a lower court following lower court authority was where the final appeal court was most likely to be unanimous and/or provide a single judgment, which would reduce judgment length. The results also mirror those found in *Chapter 3* in relation to human rights judgments. Human rights judgments considered more

[109]Duxbury found the reasoning of decisions central to the binding nature of precedent; *The Nature and Authority of Precedent*, n83

[110]This is part of the 'buttressing' function of concurring opinions suggested by Lee; J Lee, 'A defence of concurring speeches', n46

[111]F(2, 226)=2.32, p = 0.101

[112]This supports the views of E Maltz, 'The Nature of Precedent' (1987) 66 NCL Rev, 367, 370

[113]F(2, 225) = 0.86, p = 0.43

[114]F(2, 226) = 3.84, p = 0.023. Post hoc difference: 9.85, p = 0.035

authorities and as a result they took longer to hear and had lengthier judgments, however the guidance from these authorities or the jurisprudence of the ECtHR appeared to aid the judgment writing process. If these results were indicative of a wider pattern, it supports the 'consequentialist' justification for following precedent as a 'labour saving device,'[115] as following precedent appeared to ease the judgment writing process.

Table 42. Lower Court following Precedent and Length of Case

Does the lower court follow established precedent?	Mean	N	Std. Deviation
No precedent followed	1.93	102	.859
Yes; precedent set by House of Lords/Supreme Court	2.22	63	1.023
Yes; precedent set by lower court	2.16	64	.895
Total	2.07	229	.922

Table 43. Lower Court following Precedent and Judgment Gap

Does the lower court follow established precedent?	Mean	N	Std. Deviation	Minimum	Maximum
No precedent followed	95.71	102	157.568	17	1331
Yes; precedent set by House of Lords/Supreme Court	81.58	62	40.733	15	178
Yes; precedent set by lower court	73.66	64	35.602	1	173
Total	85.68	228	109.247	1	1331

Table 44. Lower Court following Precedent and Length of Judgment

Does the lower court follow established precedent?	Mean	N	Std. Deviation	Minimum	Maximum
No precedent followed	32.18	102	19.097	6	125
Yes; precedent set by House of Lords/Supreme Court	40.33	63	27.414	7	129

[115] N Duxbury, *The Nature and Authority of Precedent,* n83, p99

Yes; precedent set by lower court	30.48	64	19.592	4	98
Total	33.95	229	22.091	4	129

The quantitative results in this section suggest that the lower court had a better record when it acted in an unprecedented manner in terms of overrule and that following precedent was not necessarily successful in creating stability and certainty in the time period. The next section tries to shed more light on this by examining the resilience of precedent in the time period and the breadth of each precedent.

The Resilience of Precedent

Precedents are constantly being reinterpreted.[116] There is a limit to their enduring nature and 'more often than not the authority of a precedent will diminish rather than ripen with age.'[117] At the same time, however, precedents command resilience through the limited circumstances in which they can be completely departed from. Indeed, *The Practice Statement* of 1966 has seldom been used since its inception.[118] This perhaps says less about the resilience of precedent in the system of *stare decisis* and more about the subtler methods favoured by the judiciary to avoid the effects of a precedent. When faced with a precedent there is 'an almost limitless interpretative choice,' ranging between a narrow or extensive interpretation and application.[119] A precedent can be distinguished where the facts of the case differ and allows a degree of flexibility short of overrule. The 'creative following' of precedent is regarded by Calderone to provide a false impression of legal stability, however this practice was found to be a lot more common in the US Supreme Court than the Appellate Committee, with the latter choosing to distinguish and overrule cases in double the number of instances of the US Supreme Court.[120] Calderone suggests that the system of precedent's credibility can be threatened by too dogmatic an attitude to following precedent and concludes that the

[116]F Schauer, 'Precedent', n83, 574
[117]N Duxbury, *The Nature and Authority of Precedent*, n83, p63
[118]Lord Hope describes the 1966 Practice Statement as having only been 'applied from time to time by the Appellate Committee during the 40 years or so that were to elapse until the 1st October 2009.' *Austin v Mayor and Burgesses of London Borough of Southwark* [2010] UKSC 28 [24]. Paterson confirms that the Appellate Committee 'overtly exercised the Practice Statement on almost 25 occasions between 1966 and 2000.'; *Final Judgment*, n9 p268
[119]R Calderone, 'Precedent in Operation; A comparison of the Judicial House of Lords and the US Supreme Court' [2004] PL 759, 761
[120]Calderone, 'Precedent in Operation', n119, 780

Appellate Committee's favoured method of distinguishing situations is more 'respectful' towards the precedent and the degree of constraint that it commands.[121]

The Appellate Committee used the *Practice Statement* to depart from its own precedent in the time period,[122] however it did so infrequently. In *Chartbrook Limited v Persimmon Homes Limited*,[123] Lord Hoffmann stated *obiter* that it will only be appropriate to depart from a precedent where the previous decision is 'thought to be impeding the law or to have led to results which were unjust or contrary to public policy.'[124] It was therefore made clear that there were still 'strong arguments' for retaining the rule in *Prenn v Simmonds*[125] (that pre-contractual negotiations are inadmissible in court) and this should be considered alongside the appropriateness of departing from an established precedent that had existed for many years and had been approved in several cases.

This conservative use of the *Practice Statement* continued in the Supreme Court. Paterson noted that the *Practice Statement* had only been raised in 'a handful of cases by the start of 2013 and in none of them ha[d] the court purported to exercise it,' with the Supreme Court preferring less explicit methods to 'get round precedents of its own or the House'.[126] An example was *R (on the application of Adams) v Secretary of State for Justice*,[127] where the Supreme Court did not expressly overrule *R (Mullen) v Secretary of State for the Home Department,*[128] however Lord Phillips and Hope declared it to be of not much assistance and that a 'fresh approach was required.'[129] The Supreme Court, by contrast, appeared to actively monitor the development of precedent in the lower courts and overruled lower court precedent where necessary.[130]

Whilst the *1966 Practice Statement* has not been overly used, the Convention has opened an alternative avenue by which domestic precedents may be challenged and ultimately departed from. Lord Hope believes that the,

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[121]Calderone, 'Precedent in Operation', n119, 780
[122]*A v Hoare* [2008] UKHL 6
[123][2009] UKHL 38
[124]*Chartbrook*, n123, [41]
[125] [1971] 1 WLR 1381
[126]Paterson, *Final Judgment*, n9, p267.
[127][2011] UKSC 18
[128][2004] UKHL 18. Here Lord Bingham appeared to equate a 'miscarriage of justice' under s133 Criminal Justice Act 1988 to a failure in the trial process rather than the discovery of new facts.
[129]*Adams*, n127 [35]
[130]See *Meier,* n76, which overruled *Drury v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 200. See also *Mahad (Ethiopia) v Entry Clearance Officer* [2009] UKSC 16 overruling *MW (Liberia) v Secretary of State for the Home Department* [2007] EWCA Civ 1376

> interests of human rights law would not be well served if the House were to regard itself as bound by a previous decision as to the meaning or effect of a Convention right which was shown to be inconsistent with a subsequent decision in Strasbourg.[131]

The court will therefore depart from existing final appeal court precedent where a decision of the Grand Chamber requires this.[132] In doing so, the *1966 Practice Statement* need not be expressly invoked. The Convention has widened the grounds for challenging a precedent, which can now be destabilised by another institution's interpretation of matters; adding a further institutional layer to the doctrine of *stare decisis* in the UK. Nevertheless, the court clearly sought to limit how far Strasbourg jurisprudence could result in wholesale departures from existing decisions and thus impact upon traditional principles of certainty. In *Doherty v Birmingham City Council,*[133] the Appellate Committee declined to rely on the decision in *McCann v UK*,[134] which appeared to support the minority view in *Kay v Lambeth Borough Council*,[135] to depart from the majority view in that decision. Instead the majority view was developed in a manner consistent with *McCann.* In taking that route, Lord Hope appeared to have been influenced by the fact that an overrule would have required the case to be reconvened by a panel of nine Law Lords given that *Kay* was decided by a panel of seven. Furthermore,

> it is well settled that the power to overrule a recent decision of this House which your Lordships undoubtedly have ought not to be exercised unless there is some very good reason for doing so.[136]

Lord Hope believed that the Strasbourg line required further substantiating in order to have objective standards that could generally be applied.[137] *HM Treasury v Mohammed Jabar Ahmed*[138] demonstrated that the Supreme Court would also await an authoritative decision of the Strasbourg Court to determine whether a departure from precedent was required. The Supreme Court declined the invitation to depart from a relatively recent Appellate Committee authority[139] that determined the extent to which obligations under the Charter of the United Nations 1945 take precedence to Convention rights until such a time as the Strasbourg Court provided definitive guidance for all states

[131] *R (on the application of Purdy) v DPP* [2009] UKHL 45 [34]
[132] *See Re McCaughey's Application for Judicial Review* [2011] UKSC 20
[133] [2008] UKHL 57
[134] (19009/04) [2008] 2. F.L.R 899
[135] [2006] UKHL 10
[136] *Doherty,* n133 [19] per Lord Hope citing *R v Kansal (No 2)* [2002] 2 AC 69 and *R v Knuller (Publishing, Printing and Promotions) ltd* [1973] AC 435
[137] *Doherty,* n133 [20]
[138] [2010] UKSC 2
[139] *R (Al Jedda) v Secretary of State for Defence* [2007] UKHL 58

to follow.[140] In this sense, the final appeal court retained ultimate authority over the domestic system of precedent. In *R (on the application of RJM) v Secretary of State for Work and Pensions*,[141] Lord Neuberger confirmed that where a final appeal court decision appeared to conflict with Convention jurisprudence, it was for the final appeal court to decide whether to depart from that authority and the lower court was still bound by the authority until that time. The lower court was, however, free to depart from its own precedents where those precedents appeared to conflict with Strasbourg jurisprudence.[142]

Finally, it should be noted that whereas ECtHR authority can leave a domestic precedent vulnerable, Parliament, as in institution, is able to reinforce a precedent through either negative or positive action. 'Legislative inertia' was used by the judges to justify the resilient nature of a particular precedent, despite the fact that this negative form of approval does not necessarily guarantee that Parliament specifically approved of the decision.[143] In *Gallagher v Church of Jesus Christ of Latter-day Saints*,[144] the Appellate Committee had to determine whether a Mormon church was exempt from business rates as 'a place of public religious worship.' An earlier Appellate Committee decision had interpreted the relevant statute and the fact that the legislature had had two opportunities to reconsider the authority and had not done so was determinative in declining to depart from that authority.[145]

Overall, it appears that neither the use of the *Practice Statement* nor the jurisprudence of ECtHR led to many instances of overt departure from final appeal court precedent in the time period; however, there was less reticence when it came to departing from lower court precedent. In this sense, precedent itself was fairly resilient and the overrule of the lower courts following precedent was more likely owing to the way that precedent had been interpreted or applied. In an effort to understand a little more about how precedent has the capacity to guide the lower courts, the next section examines the breadth of each precedent in the time period.

The Breadth of Precedent

[140] See also *R (on the application of Smith) v Secretary of State for Defence* [2010] UKSC 29 [21] where Lord Phillips claimed that a House of Lords decision would be 'definitive' unless 'plainly invalidated' by a subsequent Strasbourg decision.
[141] [2008] UKHL 63
[142] *R(RJM),* n141 [66]
[143] See Maltz, 'The Nature of Precedent', n112, 389
[144] [2008] UKHL 56
[145] *Gallagher*, n144 [10]. See also *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38 where the Supreme Court declined to overrule 200 years of authority in the anti-deprivation rule, on the basis that the modern statutory regime must have been enacted with that rule in mind.

The role of the final appeal court is to oversee the coherent development of the law. It may, therefore, be tempting for the final appeal court to utilise the opportunities that individual cases present and to increase the breadth of precedent by going wider than the issues raised in the lower court and by counsel. Practically, the arguments that can be raised are to a large extent constrained by the Supreme Court rules and practice directions[146] which, although permitting a new argument to be raised in advance, ensure that the skeleton of an appeal is predetermined by the case in the lower court.[147] New arguments were only exceptionally raised in the time period.[148] Exceptions were also rare in the past, with 12 cases arising during the period 1952-68 allowing the rule to be expressly waived and only 2 appeals being allowed on the basis of that new argument.[149] Furthermore, Paterson found a 'high degree of consensus' amongst counsel whom he interviewed that it is inappropriate '… for the judges to decide appeals on points of law which have not been argued by counsel or at least put to them for comment.'[150] He later referred to this as a 'normative expectation' of counsel.[151] Paterson referenced several cases that arose in the time period where this convention may have been breached.[152] However, there were also cases arising in the time period that could have merited a fuller review of the area owing to 'uncertainty' and academic criticism, yet the court declined to do so as they were not invited to broaden the remit of the case by counsel.[153] *Norris v Government of the USA*[154] was one such case. In *Norris,* Lord Phillips alluded to the controversial decision of *R (Wellington) v Secretary of State for the Home Department*,[155] which determined that the desirability of extraditing a fugitive, who would otherwise completely escape justice, meant that circumstances ordinarily regarded as 'inhuman and degrading' in the domestic context would not necessarily be so if it prevented the extradition of the offender. Even though *Norris* was also an extradition case, albeit considering a different Convention article, and there was a

[146]Counsel have to submit the Appellant and Respondent's case, including the heads of argument they intend to raise in advance and they also need to make clear when they intend to drop an argument that was raised in a lower court or apply to the court to raise an argument that was not raised in the lower courts; UKSC PD 6; *The Appeal Hearing* at 6.3.2 and 6.3.3 respectively.

[147]These Practice Directions preserve the '…unwritten, but firm rule of the House not to consider arguments which have not been considered by the courts below'. Blom-Cooper and Drewry, *Final Appeal,* n1, p247

[148]See *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58 where the Secretary of State was prompted by an admissibility decision of the Grand Chamber of the ECtHR to raise the issue of attribution; whether the detention of the individual was pursuant to UN Resolutions and out-with the scope of the Convention.

[149]Blom-Cooper and Drewry, *Final Appeal,* n1, p247

[150]Paterson, *Final Judgment*, n9, p20

[151]Paterson, *Final Judgment*, n9, p20

[152]Lord Phillips' judgment in *Walumba Lumba (Congo) v Secretary of State for the Home Department* [2011] UKSC 12 and Lady Hales' in *McDonald v Royal Borough of Kensington and Chelsea* [2011] UKSC 33 and *Granatino v Radmacher (formerly Granatino)* [2010] UKSC 42; Paterson, *Final Judgment*, n9, p22

[153]See *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58 and *Jones v Kernott* [2011] UKSC 53; Paterson, *Final Judgment*, n9, p28

[154][2010] UKSC 9

nine justice panel convened which would have provided an authoritative overrule, Lord Phillips still believed that 'this [wa]s not an occasion on which it would be appropriate to review it.'[156] In doing so, the Supreme Court demonstrated its unwillingness to use the authority of a larger panel to widen the area of review beyond the four corners of the case.

From a doctrinal perspective, it is unclear whether a wider decision would create a lesser or greater constraint on lower courts. On the one hand, it would create a deeper constraint as it would provide a wider base with which the decision could be assimilated with future cases and thus make it harder to distinguish the past decision. Nevertheless, too wide a decision may obfuscate the *ratio decidendi* and make it impossible to 'articulate a characterisation' of the decision that can be applied to future cases.[157] Thus, if a precedent is too wide it may constrain even further the freedom of judges to consider what justice requires on the facts before them. The issues of 'breadth' and the 'constraining force' of a decision were both evident in Lord Collins opinion in *R (on the application of Smith) v Secretary of State for Defence*.[158] Lord Collins was uncertain whether Lord Bingham's determination that soldiers in Iraq were not under the jurisdiction of the UK formed part of the ratio of *R (Gentle) v Prime Minister*,[159] given that there was no extensive argument on the point. Collins clearly wished to consider the matter on its own terms and felt that 'it would be wrong … to dispose of the matter simply on the basis that the issue was covered by precedent.'[160]

There is academic support for a narrow approach to the precedential force that attaches to each case. *Final Appeal* favoured the rule as they did not wish to see individual cases straining under the weight of the jurisprudence developed from their specific facts.[161] Murphy and Rawlings labelled the process of defining the issues in the case and answering only those issues as a 'particularist' approach to judgment writing, which in turn can assist the judges in avoiding matters of policy as well as the need to provide more widely applicable pronouncements on the law.[162] Nicol agrees that this is the identity of judicial decision-making compared to executive and parliamentary decision-making; the latter being able to make law and policy on any issue. Nevertheless, he does highlight the utility of *obiter dicta* to reach beyond the limits of the case, particularly in the Convention context;

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[155][2008] UKHL 72
[156]*Norris,* n154 [47]
[157]F Schauer, 'Precedent', n83, pp579 and 594
[158][2010] UKSC 29
[159][2008] UKHL 20
[160]*R(Smith),* n158, [235]
[161]Blom-Cooper and Drewry, *Final Appeal,* n1, p292
[162]WT Murphy and RW Rawlings, 'After the Ancien Regime: The Writing of the Judgments in the House of Lords (1982) 45 MLR 34, 41

> Obiter dicta have frequently been more important than the ratio of a case, and in the context of the Human Rights Act, they allow courts to transmit a broader message as to the Convention-compatibility of certain types of measure.[163]

Indeed, the overriding duty to ensure the correct development of Convention based law and the common law can force the final appeal court into widening the remit of the case. In *Walumba Lumba v Secretary of State for the Home Department,*[164] Lord Dyson described it as 'unfortunate' that the Court of Appeal sought to determine whether there was 'a general rule of law that policies must be published' given that the issue was 'not before them and was not, therefore, the subject of argument or citation of authority.' He noted, however, that it was a 'point of general public importance' and felt compelled to state why he felt the Court of Appeal was 'wrong on this issue both as a matter of common law and ECHR law.'[165] Furthermore, in *Mayor and Burgesses of London Borough of Hounslow v Powell*, the court was prepared to address whether A8 proportionality requirements permitted the court to suspend an order for possession longer than the time period allotted in s89 of the Housing Act 1980, even though the question did not arise on the facts, as the court had heard full argument on it and it was a matter of some importance.[166]

Scottish Courts

The Scottish Claim of Right 1689 established the right of appeal from a Scottish civil case to the Scottish Parliament. The Scottish Parliament was then absorbed into the English Parliament by Article III Treaty of Union,[167] with the right of appeal transferring to the House of Lords.[168] The position was consolidated by the Court of Session Act 1988.[169] The Government's 2003 Consultation Paper advocated the benefits of retaining jurisdiction over such appeals. It stated:

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[163]D Nicol, Law and Politics after the Human Rights Act [2006] PL 722, 726 citing *R. (on the application of ProLife Alliance) v BBC* [2003] UKHL 23 by way of example.
[164][2011] UKSC 12
[165]*Walumba*, n164 [36]
[166][2011] UKSC 8 [59]
[167]'That the United Kingdom of Great Britain be Represented by one and the same Parliament to be stiled the Parliament of Great Britain.'
[168]This was despite the wording in Article XIX Treaty of Union, 'that no Causes in Scotland be cognisable by the Courts of Chancery, Queens-Bench, Common Pleas or any Court in Westminster-hall and that the said Courts of any other of the like nature after the Unions shall have no power to cognosce, review or alter the Acts or Sentences of the Judicatures within Scotland or stop the Execution of the same.'
[169]Department for Constitutional Affairs Consultation Paper; *Constitutional Reform: a Supreme Court for the United Kingdom*, CP 11/03, 14th July 2003, p15

> There are benefits to the Scottish justice system in having important cases reviewed by judges with a different background, and indeed advantages to the larger jurisdiction also in drawing on resources of a different legal tradition at the highest level.[170]

The Supreme Court therefore retains the jurisdiction over Scottish civil appeals however it has no equivalent jurisdiction over Scottish criminal appeals. The Consultation Paper confirmed that the Supreme Court was to act as a court for the United Kingdom and that the role of the President of the Court was 'to guide the Supreme Court in the development of the law in each jurisdiction and across the United Kingdom.'[171] The identity of the distinct legal systems in the UK was supported by s41 CRA which confirmed that a decision of the Supreme Court in an appeal from a particular jurisdiction is a decision for that jurisdiction only.

The Scottish jurisdiction exercised by the court was not insignificant in the time period, although perhaps proportionately less than that recorded in previous studies. In *Final Appeal,* the small number of appeals meant that the numbers fluctuated widely between years however the overarching statistic for the time period suggested that 21.9% of civil appeals came from Scotland.[172] The 'Origin of Appeals' section noted that only 7% of the Appellate Committee's caseload came from Scotland. However, with the addition of the devolution issue jurisdiction, Scottish appeals amounted to 13% of the overall workload in the Supreme Court; a figure that accords with the 12% of appeals that Dickson suggests is in line with the population of that jurisdiction and in keeping with the convention of having 2 Scottish Law Lords.[173] The figures confirm that the institutional relationship with Scotland remained important in the time period.

The relationship with Scottish courts can be viewed through the same thematic lens as the first section of this chapter-overrule and precedent, with some adjustments. The overrule statistics for Scottish courts were outlined more generally in the overrule section above; the success rate stood at 44.4% for Scottish civil appeals and at 40% for devolution issue appeals and showed that the final appeal court did not just act as a 'rubberstamp' to Scottish lower court decisions in the time period.[174] This section focuses on setting precedent for the Scottish jurisdiction. It examines the composition of the judicial panels and contributions made by English and Scottish judges in Scottish decisions, with the aim of gauging the relative Scottish and English influence on the development of Scots law in the time period. The empirical data on the composition of judgments in Scottish cases is

[170] *A Supreme Court for the United Kingdom*, n169, p22
[171] *A Supreme Court for the United Kingdom*, n169, p41
[172] Blom-Cooper and Drewry, *Final Appeal,* n1, p378
[173] B Dickson, 'The Lords of Appeal and their work 1967-1996', n2, p146
[174] Blom-Cooper and Drewry, *Final Appeal,* n1, p380

also reviewed to see the extent to which Scots law appeals were kept distinct to that legal system or whether there was evidence of crosspollination between UK legal systems. By doing so the character of the institutional relationship with Scotland and the Scottish courts will be gauged through the communication channel of precedent and the extent to which the final appeal court sought to contribute to Scots law either through English specialist expertise or through access to the English common law resource. Finally, this section concludes with a review of the new devolution issue jurisdiction to see the influence that it had on institutional relations with the Scottish courts and also the discrete influence that Strasbourg had on institutional relations in the Scottish context.

Scottish Precedent; the Composition and Contribution of the Panel

The composition of the panel nearly always observed the convention of having at least 2 Scottish Law Lords on Scottish Appeals with only 3 of 23 Scottish cases (including devolution issues) not adhering to the convention.[175] Thus 87% of Scottish appeals in the time period followed the convention whereas just 22% (50/223) of English and Northern Irish appeals had both Scottish judges on the panel. The need to maintain an axis of Scottish expertise in Scots law appeals appeared to be even more astutely observed than at the time of *Final Appeal*, where the convention was observed in 77% of Scottish appeals and two Scottish judges sat in 34% of English and Northern Irish appeals.[176] Only one Scottish case in the period saw Lords Hope and Rodger disagree, as discussed further below, and 88% of the time when Lords Hope and Rodger sat together on non-Scottish appeals they agreed.[177] Thus the axis of Scottish judicial opinion was fairly robust. Nevertheless, there is a limit to Scottish judicial resource and this circa 10% increase in the convention observance in Scots law appeals since *Final Appeal,* resulted in a 10% reduction in the observance of the convention in English and Northern Irish appeals. Individually, however, Lord Hope sat on 55% (122/223) and Lord Rodger sat on 44% (99/223) of non-Scottish appeals in the time period. Furthermore, Scots judges sat together and made more individual appearances on non-Scottish cases in the Supreme Court proportionately compared to in the Appellate Committee.[178] In this sense, the Scottish influence on non-Scots cases was higher in the Supreme Court.

[175] *Spencer Franks v Kellogg Brown and Root Limited* [2008] UKHL 46; *Morrisons v Scottish Power* [2010] UKSC 37; *Scottish Widows v HMRC* [2011] UKSC 32

[176] Blom-Cooper and Drewry, *Final Appeal,* n1, p173

[177] Of the 50 occasions they sat together on non-Scottish appeals, Lords Hope and Rodger disagreed on at least one issue on 6 appeals, 4 of which were in the Supreme Court.

[178] Individually Lord Hope sat on 59/120 and Lord Rodger sat on 48/120 non-Scottish cases in the Appellate Committee (49% and 40% respectively) and Lord Hope sat on 63/103 and Lord Rodger 51/103 non-Scottish cases in the Supreme Court (61% and 50% respectively). Furthermore 34/50 occasions when they sat together in non-Scottish appeals was in the Supreme Court.

Final Appeal found that instances of Scottish judges delivering full judgments were 'markedly more' frequent in Scottish appeals.[179] The Scottish judges were very active in the time period, particularly in Scots law appeals. Every Scottish appeal had at least one Scottish judge on the panel. Lord Rodger sat on all Scottish appeals bar one and gave full judgment on 15 of these 23 occasions. Lord Hope sat on all appeals bar 2 and gave full judgment in 19 instances. Non-Scottish judges did, nevertheless, have a role in Scots law appeals. At least one non-Scottish judge gave judgment on 17 of 23 occasions, although this occurred more commonly in Scottish civil appeals than in devolution issues. Furthermore, a non-Scottish judge would occasionally take the lead judgment where that played to his or her speciality. This occurred on 7 occasions, 2 of which were single judgments.[180] Historical statistics on judicial contribution to Scots law appeals confirm that this study's results follow a general pattern of rising contribution from Scottish and English Law Lords to Scots law appeals in the latter years of the Appellate Committee.[181] It should also be recalled that judges can contribute to a judgment in more subtle ways, such as to the oral argument or the first conference following the hearing, even if it may not be for 'as long as the specialist Law Lords.'[182]

Despite evidence of a more bold English judicial contribution to Scots law than previously, it would be unfair to accuse 'non-specialist' English judges of determining Scots law matters, given that only one Scottish judgment in the period was not unanimous,[183] and owing to the diligence of the Scottish judges on Scots appeals in both sitting and judgment writing. *Roberts v Gill & Co*[184]was an English appeal that showed the potential for English judges to challenge a Scottish judge's reading of Scots law in *obiter* comments. Lord Collins disputed Lord Hope's reading of Scots law as to whether trustees *must* be joined to a beneficiary's action. This was, however, 'only with the greatest hesitation' and with the support of Lord Rodger, the other Scottish judge.[185] Lord Rodger agreed with Lord Collins' reading however he was reluctant, 'to get drawn into a discussion of a tangential

[179]Blom-Cooper and Drewry, *Final Appeal,* n1, p179
[180]*Spencer Franks,* n175 (Lord Hoffman); *Farstad*, n49, 18 (Lord Clarke); *Principal Reporter v K* [2010] UKSC 56 (Lord Hope and Lady Hale joint judgment of court); *Scottish Widows*, n175 (Lord Walker); *Helow v Secretary of State for the Home Department* [2008] UKHL 62 (Lord Mance); *Simmers v Innes* [2008] UKHL 24 (*Lord Neuberger* with formal concurrences) and *Grays Timber Products ltd v HMRC* [2010] UKSC 4 (Lord Walker with formal concurrences)
[181]In 30 Scottish appeals that arose between 2003-2009, Scots judges gave an opinion in 83% of cases they heard whereas non-Scots judges did so on 55% of cases they heard. In 48 Scottish appeals that arose between 1993-2002, Scots judges gave an opinion in 68% of appeals they heard compared to non-Scots judges who only did so on 17% of appeals. Statistics taken from Appendix IV Statistical Information, Walker Report, n12, and J Chalmers, 'Scottish Appeals and the proposed Supreme Court' [2004] Edin LR 4, 8
[182]Paterson, *Final Judgment*, n9, p85 and p239-240
[183]*Martin* [2010], n24
[184][2010] UKSC 22
[185]*Roberts*, n184 [54]

point of Scots law which was not argued and is not free from difficulty.'[186] In a separate appeal, Lord Collins appeared astutely aware that where an appeal overruled the Court of Session and involved intricate principles of Scots law, where Scots law academic commentary was cited widely and the area was expressly acknowledged to be confusing, he should defer to the Scottish Justices and reduce the scope of his judgment.[187] Overall, the data suggests that an appropriate balance seemed to be struck between utilising non-Scottish judges' technical expertise, whilst maintaining Scots law specialist knowledge on each Scots law appeal.

Final Appeal suggested that formal concurrences were only 'slightly more common' in Scottish civil appeals compared to English civil appeals.[188] The statistics measured the average number of concurring opinions provided relevant to where the appeal originated from (see Table 45). Although the average is slightly lower for the Court of Session and the High Court of Justiciary, as compared to the Court of Appeal (Civ), the High Court and the Northern Ireland Court of Appeal, it is still on par with the Northern Ireland High Court and far greater than cases originating from the Court of Appeal (Crim). No statistical relationship was found to exist between the figures and so all that can be concluded is that there is a slightly lower instance of judges being prompted to provide concurring opinions in Scottish civil cases compared to civil cases arising in England and Wales or Northern Ireland. These statistics reflect the findings above that single judgments occurred most frequently in Scottish and criminal appeals, and that in multi-opinion judgments, both Scottish and non-Scottish judges were willing to contribute. The deployment of a single judgment in such cases was potentially a political manoeuvre to demonstrate that the final appeal court was at one in its decision in the specialist area and to unite the Scottish and English Justices in the judgment delivered.

Table 45. Originating Court and Average Number of Concurring Opinions

	N	Mean	Std. Deviation
Court of Appeal Civil Division	169	2.14	1.762
Court of Appeal Criminal Division	20	1.65	1.663
High Court	14	2.14	1.916
High Court of Justiciary	5	2.00	1.225
Court of Session	18	2.00	1.782
Northern Ireland Court of	10	3.00	1.563

[186] *Roberts*, n184 [87]
[187] *Inveresk plc v Tullis Russell Papermakers Limited* [2010] UKSC 19. Lord Collins spoke merely to note what the English position would have been.
[188] Blom-Cooper and Drewry, *Final Appeal,* n1, p178

Appeal			
Northern Ireland High Court	2	2.00	2.828
Total	238	2.12	1.749

Final Appeal tried to assess the extent to which there had been an 'anglicisation' of Scots law partly through looking at Scottish appeals and recording whether the Scottish Law Lords were prepared to dissent against the views of their English colleagues.[189] This method was one of the few ways that the authors could objectively assess whether the Scottish Law Lords presence in the Appellate Committee, 'adequately ensured the purity of Scots law in appeals from Scotland'.[190] Blom-Cooper and Drewry began by comparing dissent rates to rates of attendance and found that Scots Law Lords dissented at a similar rate to English Law Lords in English appeals and that they were no more likely to dissent in a Scottish appeal than an English appeal. The authors found that the overall dissent rate in Scottish appeals was lower than in English appeals and where there was a dissent it tended to be a Scottish Law Lord in the dissenting position.[191] In cases that involved two dissents no evidence was found to support the notion that Scottish judges 'stuck' together.[192]

Table 46. Originating Court and Average Number of Dissenting Opinions

Which court the appeal originated from	Mean	N	Std. Deviation
Court of Appeal Civil Division	.46	169	.906
Court of Appeal Criminal Division	.55	20	.999
High Court	.50	14	.855
High Court of Justiciary	.40	5	.894
Court of Session	.00	18	.000
Northern Ireland Court of Appeal	.80	10	1.033
Northern Ireland High Court	.50	2	.707
Total	.45	238	.883

Table 46 confirms some of these results in the time period. In Scottish civil cases, the final appeal court did not return a dissenting opinion once in all 18 cases that arose. This provides a strong

[189]Blom-Cooper and Drewry, *Final Appeal,* n1, p188
[190]Blom-Cooper and Drewry, *Final Appeal,* n1, p377
[191]Blom-Cooper and Drewry, *Final Appeal,* n1, p189
[192]Of 49 English Appeals involving 2 dissents only 1 had 2 Scottish dissenters and of 10 Scottish Appeals with 2 dissents only 2 involved 2 Scottish dissenters*;* Blom-Cooper and Drewry, *Final Appeal,* n1, p189

indication that unanimity levels continued to be stronger in Scottish civil cases and there was a marked reluctance for English Justices to go against the opinion of their Scottish colleagues. Scottish courts had a greater chance of receiving a unanimous judgment than either the English or the Northern Irish courts. The High Court of Justiciary had an average dissent rate on a par with the other lower courts, however general conclusions cannot be drawn on the basis that only 5 devolution issue cases arose. *Martin and Miller v HM Advocate,*[193] was the only case that returned a dissenting opinion and it was from a Scottish Justice (Lord Rodger) and a Northern Irish Justice (Lord Kerr). Indeed, Lord Kerr may have been more comfortable dissenting with the support of a Scottish Justice.

Overall, it is clear that Scottish appeals tended to be unanimous. Each appeal would have at least one Scottish Justice, with the convention of two Scottish judges being observed in the vast majority of cases. That said, English judges still regularly provided a judgment in Scottish civil appeals including the lead judgment, although not so much in devolution issue cases and their contribution was less, on average, than in English civil appeals. Interestingly, Scottish judges contributed quite widely to non-Scottish cases and more so in the Supreme Court. It may be that the Supreme Court is more actively engaging in its role as a court for the whole of the UK, with English and Scottish judges each reciprocally sitting and contributing more regularly to cases arising in an alternate jurisdiction. Caution needs to be exercised however, as Lord Hope was Deputy President of the court and it is more likely owing to this position and his seniority, rather than his status as a Scottish judge that he was so active in the time period. The next section explores a bit further the idea of setting precedent for the Scottish legal system and the ways that influence of an alternate legal jurisdiction could enhance both Scottish and non-Scottish precedent.

Scottish Precedent; Distinction and Crosspollination between UK legal systems

The formation of and reliance upon precedent in Scottish cases engages certain jurisdiction specific considerations. The integrity of Scots law must be protected in the court's role as a court for the UK. The government believed that the ability for judges from a 'different background' who are able to 'draw on resources of a different legal tradition' could create 'advantages to the larger jurisdiction'.[194] The Walker Report was more specific and recognised the advantages that came from the relative size and history of the English jurisdiction. Provided there was no 'undue influence' or threat to the inherent 'integrity' of Scots law, English law was recognised as being a jurisdiction 'closely aligned' to Scots law and possessing 'undeniably rich doctrinal resources' in the origin of the

[193] *Martin*, n24

common law. The 'quantity and quality' of English precedent could not be matched in Scotland.[195] Walker, nevertheless, questioned whether sharing a final appeal court was a necessary means of achieving access to this resource. He did, however, concede that a shared court was the only means of allowing Scots' appeals access to English judicial expertise acquired within a generalist court that covered a wide variety of subject matters and which had a proportionately higher caseload.[196] As seen above, English judges were prepared to take the lead on Scots' cases, where the subject matter lay particularly within their specialist expertise. The use of English judicial resource in Scots' cases in this way demonstrates the value that English judges can add to such appeals and that their judgment is not always secondary to the reasoning of the Scottish judges.

Whether sending appeals to London provides more access to English common law resource, depends on how much that resource is used in Scots law cases. The quantitative data in Table 47 suggests that the final appeal court judges were much better at citing English comparative authority in Scottish or Northern Irish cases than they were at citing either Scottish or Northern Irish comparative authority in English and Welsh decisions. A case that originated in the Court of Session or the Northern Ireland Court of Appeal would, on average, cite between 6-7 domestic comparative authorities (or between 8-9 authorities when those courts were being overruled). However the final appeal court was only likely to cite 1 domestic comparative citation, if any, when the case originated in an English court. Furthermore, Court of Session judgments were found to be a lot shorter in length and so proportionately more of a Court of Session judgment will be devoted to domestic comparisons. This direction of comparison could be expected given the relative size of each respective legal jurisdiction. The results may also reflect the practical difficulties of gaining access to the authorities in the Scottish and Northern Irish jurisdictions. For instance, Baroness Hale, speaking in the context of the Court of Appeal, has commented that lawyers often do not have the time or the resources to undertake comparative research between domestic legal systems.[197]

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[194] *A Supreme Court for the United Kingdom*, n169, p22
[195] Walker Report, n12, p58
[196] Walker Report, n12, p59
[197] B Hale, 'A Supreme Court for the United Kingdom' (2004) 24(1/2) LS 36, 38

Table 47. Originating Court, Overrule and Average Number of Domestic citations

Overrule	Which court the appeal originated from	Mean	N	Std. Deviation
Yes	Court of Appeal Civil Division	.59	97	1.289
	Court of Appeal Criminal Division	1.29	7	1.704
	High Court	1.20	5	1.789
	High Court of Justiciary	5.00	2	5.657
	Court of Session	8.10	10	7.866
	Northern Ireland Court of Appeal	8.83	6	6.145
	Total	1.70	127	3.808
No	Court of Appeal Civil Division	.94	62	1.524
	Court of Appeal Criminal Division	.62	13	1.193
	High Court	.67	9	.500
	High Court of Justiciary	2.33	3	.577
	Court of Session	4.38	8	4.069
	Northern Ireland Court of Appeal	4.00	4	6.055
	Northern Ireland High Court	8.00	2	11.314
	Total	1.45	101	2.700
Total	Court of Appeal Civil Division	.72	159	1.391
	Court of Appeal Criminal Division	.85	20	1.387
	High Court	.86	14	1.099
	High Court of Justiciary	3.40	5	3.209
	Court of Session	6.44	18	6.573
	Northern Ireland Court of Appeal	6.90	10	6.280
	Northern Ireland High Court	8.00	2	11.314
	Total	1.59	228	3.358

The statistics reveal a modest use of comparative resource in Scots' appeals and show that Scottish litigants still have limited exposure to the 'rich' English common law heritage by taking their case to the final appeal court. Nevertheless, these quantitative citation figures only measure separate

citations and do not take into account incidences of repeat citations. Past studies have shown that when the final appeal court cites authorities, it tends to do so in a considered and meaningful way and that each citation forms part of a carefully considered reasoning process. Calderone's comparison of the use of precedent (which he deemed to be any citation of a prior determined case) in judicial review cases in the Appellate Committee and the US Supreme Court found several notable trends. The latter court cited more discrete cases however the average citation rate was one citation higher in the Appellate Committee owing to repeat citations. Appellate Committee repeat citations appeared to be the result of extended debate and detailed consideration of the authorities in question, as opposed to just 'passing references' in the US Supreme Court.[198] Furthermore, Calderone found that the Law Lords often cited more than one judicial opinion per citation to establish common ground in the case.[199] The quantitative data, therefore, is limited in that it does not reveal the true extent of citation rates based on repeat citations.

The quantitative data also does not depict how the authorities were actually used. *Final Appeal's* 'highly subjective' impressions were that save where the Law Lords were interpreting a mutually applicable statute and trying to create some form of uniformity in Scotland and England, they deliberately avoided adopting English approaches to issues arising in Scots law.[200] Thus in 1952-68 only three cases were found which were felt to provide examples of 'unadultered Anglicisation'[201] and, on the whole, this concern was misplaced. Indeed Chalmers has observed that between 1993-2002, English judges in the Appellate Committee were only prepared to deliver a speech on certain areas namely statutory or contractual interpretation or the law of negligence, and aside from this tended to 'defer' to the Scottish judges.[202] These are the same areas where Walker has pointed out the need for some level of coherence:

> there are some areas of Scots law, such as the law of negligence, aspects of contract law and large parts of public law, that have developed in quite close coherence with laws of other parts of the UK, and here the proper unit to benefit from the values of coherence and integrity within the relevant local sectors may be the UK rather than Scotland.[203]

[198]Calderone, 'Precedent in Operation', n119, 773-775
[199]Calderone, 'Precedent in Operation', n119, 779
[200]Blom-Cooper and Drewry, *Final Appeal,* n1, p382
[201] *C.I.R. v Glasgow Police Athletic Association* [1953] AC 380; *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corp* [1968] AC 138 and *C.I.R. v Hood Barrs* [1957] 1 WLR 529. See Blom-Cooper and Drewry, *Final Appeal,* n1, p382
[202]Chalmers, 'Scottish appeals and the proposed Supreme Court', n181, 9
[203]Walker Report, n12, p57

The observational data in this study confirms that English authorities tended to be cited where English law was acknowledged to be in step with Scots law. As such, domestic comparative citations were made in each of the legal areas identified by Walker as being in 'close coherence' on both sides of the border. In *Mitchell v Glasgow City Council*,[204] the English comparative citations were made in response to the suggestion that the test in *Caparo Industies plc v Dickman*[205] of whether it is 'just and reasonable' to impose a duty of care may not be applicable to Scots law or to personal injury cases. Lord Hope, however, could 'see no good reason why, as a general guide to what is required, it should not be regarded as part of Scots law.'[206] He cited both historical and recent English authorities to trace the origins of the test and when it had been applied in a personal injury context. He also pointed to Scottish authorities where it had unquestioningly been applied. Lord Hope was guided by the fact that 'no principle of Scots law ... contradicts it' and that 'the law of liability for negligence has developed on common lines both north and south of the border.'[207] Lord Brown also referred to the crosspollination between the two legal systems in that 'much of England's negligence law was forged in Scottish appeals.'[208]

Eba v Advocate General for Scotland[209] was a public law case heard alongside two English appeals on the scope of judicial review of decisions of the Upper Tribunal. Unlike the usual practice in conjoined appeals, separate judgments were provided for England and Wales and for Scotland. In doing so, the Supreme Court appeared to strike the balance between pulling resources in analogous case, whilst recognising the distinct integrity of each legal system. The court noted that Scottish authorities recognised 'no substantial difference between English and Scots law as to the grounds on which the process of decision-making may be open to review' and that '... Scots law has been able to follow the developments in the English approach to judicial review since *Anisminic* ...'. The court concluded that:

> It would not ... be a very large step for the Scots approach to unappealable decisions of the Upper Tribunal to align itself with that which has now been decided should be taken in England and Wales.[210]

Multi-Link Leisure Developments Limited v North Lanarkshire Council,[211] was a contractual case where Lord Hope relied upon an English authority[212] for the proposition that the 'commercial or

[204][2009] UKHL 11
[205][1990] 2 AC 605
[206]*Mitchell,* n204, [25]
[207]*Mitchell,* n204, [25]
[208]*Mitchell,* n204, [80]
[209][2011] UKSC 29
[210]*Eba*, n209, [46]

business object' of a provision may be relevant to interpreting a provision in a contract. He suggested that the English authorities in this area were 'more clearly explained' than 'the 19th century Scottish cases referred to by the Extra Division,'[213] and in doing so highlighted the clear benefit to Scots law from drawing on a larger jurisdiction that was more likely to have recent authorities on a contractual point.

The court was also careful to recognise that not all commercial or public law matters were aligned between the two jurisdictions and that there remained distinct differences in the legal systems, even within these subject areas. This included the taking of security for shares[214] and the right of access to judicial review.[215] The English judges were also careful to adopt Scots law terminology in their judgments in these areas. Thus they referred to a 'delictual' rather than 'tortious' duties of care[216] and used procedural language such as 'averments', 'reclaiming motions' and 'pursuers.'[217] Procedurally, the limits of the final appeal court jurisdiction were also made clear including not interfering with the discretion of the Lord Ordinary or a decision of the Court of Session on procedural matters.[218]

The other side of the coin was whether Scots law had any influence on English appeals. Supreme Court decisions in Scottish cases are only of persuasive authority in English appeals[219] and the quantitative data suggested that Scots law authorities were not often cited in English and Northern Irish authorities. Whether 'English law has become 'Scoticised'' was 'an afterthought' in *Final Appeal*, given the dominance of the Scottish Law Lord, Lord Reid during their period of study.[220] Lord Hope was one of the most active Justices in the time period in terms of sitting and providing judgment and has been recognised as so since his appointment.[221] As such there may have been a more subtle Scottish influence on English appeals through Lord Hope than that revealed by volume

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[211][2010] UKSC 47
[212]*Prenn*, n125
[213]*Multi-link*, n211 [21]
[214]*Farstad,* n49
[215]*Eba*, n209, [27]
[216] *Mitchell* [42] (per Lord Scott)
[217]*Farstad,* n49
[218]*Bowden v Poor Sisters of Nazareth* [2008] UKHL 32.
[219]The authors of Final Appeal however regard it as 'very strong persuasive authority' in circumstances 'where the principle of law involved is comparable between the two systems'; Blom-Cooper and Drewry, *Final Appeal,* n1, p76
[220]Blom-Cooper and Drewry, *Final Appeal,* n1, p386
[221]Paterson notes that between 1996-2013 Lord Hope sat in circa 500 cases and gave judgment in 75% of these; Paterson, *Final Judgment*, n9, p245

of citations.[222] Furthermore, the observational data revealed that even if Scottish authorities per se were not often cited, other Scottish comparative resources such as statutes and Law Commission reports were used instead, to demonstrate Scottish practice in English decisions during the time period.

Reports of the Scottish Law Commission were referred to, particularly where they seemed to clarify the position in England. In *Agbaje v Akinnoye-Agbaje*,[223] the Supreme Court considered the doctrine of *forum non conveniens* and drew upon a report of the Scottish Law Commission,[224] which explained why Scotland gave less discretion to the courts to determine where an award may be appropriate in foreign divorce proceedings. The Supreme Court was then able to proceed on the basis that 'a more flexible approach was deliberately adopted' in England and Wales.[225] A Scottish Law Commission Report was again referred to in *R v G*[226] for its discussion, and clarification, of the English position in relation to sexual offences involving children under 13 years of age.[227]

Scots law, be it statutory or common law was also used to make sense of English statutes. Indeed, statutory interpretation has been recognised as an area where historically, English judges are more comfortable contributing to Scots' decisions.[228] In *Kay v Commissioner of Police of the Metropolis,*[229] Lord Rodger noted that s11 of the Public Order Act 1986 was 'loosely modelled' on s62 of the Civic Government (Scotland) Act 1982 and so comparisons could be made.[230] In *R v Rollins*,[231] the fact that the FSA had investigative powers but the Lord Advocate had the power to prosecute offences under the Financial Services and Markets Act 2000 in Scotland was used by the Committee to conclude that the FSA's lack of statutory investigatory powers for crimes under the Proceeds of Crime Act 2002 was not necessarily a barrier to it being able to prosecute offences under that act.[232] In *R v Asfaw,*[233] the position in Scotland was used to establish omissions by Parliament in s31 Asylum and Immigration Act 1999. Lord Hope acknowledged that 'the exact matching of statutory offences in England and Wales with common law crimes in Scotland is at best very difficult, and more often

[222]Paterson refers to this as 'the West Lothian question all over again', in that Scottish judges 'are appointed younger, they stay longer; they are generalists so can sit on a lot of cases' as well as often being Presiding Law Lord*;* Paterson, *Final Judgment*, n9, p245.
[223][2010] UKSC 13
[224]'Report on Financial Provision after Divorce' Scot.Law Com. No 72, 1982
[225]*Agbaje*,n223 [65] and [70]
[226][2008] UKHL 37
[227]*R v G*, n226 [23]
[228]Chalmers, *'*Scottish Appeals and the proposed Supreme Court'*,* n181, p9
[229][2008] UKHL 69
[230]*Kay*, n229 [29]
[231][2010] UKSC 39
[232]*Rollins,* n231 [30]
[233][2008] UKHL 31

than not it is virtually impossible', however he went on to state that, in the context (relating to the immunity of refugees who commit offences whilst attempting to seek asylum), there was 'no sensible reason' for Parliament to differentiate conduct on either side of the border.[234] In *TRM Copy Centres (UK) Limited v Lanwell Services Limited*,[235] Lord Hope used the position in Scotland on what constituted a hire purchase agreement to assist in interpreting s15 Consumer Credit Act 1974 in such a way that gratuitous bailments were outside of its scope. By reading the statute in this way he noted that the position was the same for both England and Wales and Scotland.[236]

There were also times where the law in Scotland was merely referred to by way of comparison. In the English criminal case of *R v Davis*,[237] Lord Rodger acknowledged that his colleagues had reviewed the English and Convention cases on anonymity of witnesses, however he went on to consider the position in Scotland to provide an alternate angle.[238] Similarly in *R v Briggs-Price*,[239] Lords Rodger and Mance noted that evidence of a crime not charged would not have been admitted in Scotland. Lord Mance implied that his 'instinctive preference' would have been the Scottish approach, however criminal law and procedure may legitimately vary widely, provided it adheres to the Convention and proper prosecutorial conduct.[240] In *Fisher v Brooker,*[241] which involved a long period of delay in asserting a claim to musical copyright, Lord Hope noted that under s8 of the Prescription and Limitation (Scotland) Act 1973, there was an arguable case that this claim would be time barred in Scotland, even though the point had not been tested in the courts.[242] Furthermore, in *Star Energy Weald Basin Limited v Bocardo SA*,[243] Lord Hope noted that the rights of ownership to airspace above land appeared to differ between England and Scotland.[244] The point of these references appeared to be in acknowledgement that there could be differences in approach to that of England and Wales as another angle to the review of the law in England and Wales.

Occasionally Lord Hope would discuss the position in Scotland with a reformist hat on, as a way of implying that procedures could be improved in England. Thus he noted that 'the Children's Hearing system provided for in Chapters 2 and 3 of the Children (Scotland) Act 1995 is not available in England and Wales' and he wondered 'whether sexual crimes committed by children should be dealt

[234] *Asfaw,* n233 [63] and [28] (per Lord Bingham)
[235] [2009] UKHL 35
[236] *TRM*, n235 [9-11]
[237] [2008] UKHL 36
[238] *Davis*, n237 [41]
[239] [2009] UKHL 19
[240] *Briggs-Price*, n239 [46] and [108] respectively
[241] [2009] UKHL 41
[242] *Fisher,* n241 [3-4]
[243] [2010] UKSC 35
[244] *Star Energy*, n243 [26]

with in the same way as sexual crimes committed by adults.'[245] Also, in looking at the varying amounts of detail provided by the prosecution in establishing breaches of Health and Safety legislation in England and Wales, Lord Hope compared the 'narrative charges' adopted in Scotland which ensures sufficient amounts of detail are provided.[246] Finally, he commented that the *ex gratia* compensation scheme for reversals of convictions still operated in Scotland and so, unlike in England, victims can still be compensated even if their case does not fall within the four walls of the statute, which he reveals is the 'unfortunate' consequence of the removal of the *ex gratia* scheme in England.[247]

Devolution Issues

The devolution issue jurisdiction is one of the core constitutional functions of the final appeal court. Devolution issues are outlined in Schedule 6, para 1 of Scotland Act 1998. They include questions over (i) whether an Act or provision of an Act of the Scottish Parliament is within its competence,[248] (ii) whether an Act of the Scottish Government, including the Lord Advocate, is or would be within its devolved competence,[249] (iii) whether an action or omission to act by the Scottish Government would be incompatible with either EU Law or the Convention rights.[250] This latter 'devolution Issue' is now classed as a 'compatibility issue' and is governed by the legal mechanisms under the Scotland Act 2012, which came into force after the conclusion of the empirical work and is discussed below. Compatibility issues are mentioned here as devolution issues, as this was how they were classified at the time of the study. Devolution issues can arise in either civil or criminal cases in three separate situations. Firstly in relation to the proposed exercise of a function of the executive in one of the devolved states, secondly, by a challenge to the legislative competence of one of the three legislatures or thirdly by the power to refer questions by a Law Officer or the Minister of the country in question.[251] The Supreme Court can also be asked to scrutinise Bills arising in the Scottish Parliament, the Northern Ireland Assembly or the National Assembly for Wales.[252]

The Government indicated its preference to transfer the jurisdiction to the Supreme Court as it would ensure a consistent approach to constitutional issues and more importantly mark a clear

[245] *R v G*, n226 [38]
[246] *R v Chargot* [2008] UKHL 73 [23-24]
[247] *Adams*, n127 [74]
[248] Sch 6 para 1(a) Scotland Act 1998
[249] Sch 6 para 1(c) Scotland Act 1998
[250] Sch 6 para 1(d) and(e) Scotland Act 1998
[251] See UKSC PD 1 and s33, s98 and sch 6 Scotland Act 1998.
[252] UKSC PD 10;*Devolution Jurisdiction* at 10.1.2.

separation between devolution issue appeals and the UK Parliament.[253] The JCPC was originally selected over the Appellate Committee to address concerns that a parliamentary body would inadvertently gain jurisdiction over Scottish criminal appeals when historically criminal matters had been exclusively retained within the Scots law jurisdiction.[254] Nevertheless, the separation of the Supreme Court from Westminster ensured that this was no longer an issue.

The devolution Issue jurisdiction of the Supreme Court propagates the constitutional role and power of the court. The court must police the devolution settlement by ensuring that the devolved parliaments and executives only act within their prescribed competencies. The Supreme Court has a power to strike down an Act of Scottish Parliament that is found to be out-with the Parliament's competence.[255] It also asserts control over the Scottish executive by reviewing any act found to be incompatible with the either Convention or EU Law.[256] The unique statutory power to hold a UK subordinate parliamentary and executive body to account also means that at a central level the Supreme Court is being tasked with safeguarding one element of the sovereign will of Parliament. Even more importantly, the devolution issue jurisdiction reflects to some extent, the universality of human rights and ensures that the Supreme Court is the final appeal court in human rights issues arising in any civil or criminal case in the UK and no matter which of the three legal jurisdictions the case arises.[257] This ensures that the Supreme Court is the sole gateway to Strasbourg, with every case having to be heard by the Supreme Court, before litigants can claim to have exhausted all domestic remedies.[258]

Leave to appeal a devolution issue raised in Scottish criminal appeals is refused in the vast majority of cases and when it is granted, it is more commonly by the High Court of Justiciary. Between 1st October 2009 and 21st April 2013, 44 applications were made to the court. The High Court of Justiciary granted leave in 11 cases, the Supreme Court in 4 cases and 29 cases were refused leave.[259] The statistics covering the period since devolution to 21st April 2013 reveal that either the

[253] *A Supreme Court for the United Kingdom*, n169, p19-20

[254] Blom-Cooper and Drewry made a case for uniformity in UK criminal law, particularly where the same statute covered matters arising in Scotland and in England and Wales. The authors also noted support for the idea that an appeal beyond the High Court of Justiciary may improve the quality of that court's jurisprudence, however they were unable to verify the popularity of this view. See Blom-Cooper and Drewry, *Final Appeal,* n1, p377

[255] s29(1) Scotland Act 1998

[256] s57(2) Scotland Act 1998

[257] See the position previously where there was a dual apex on Convention matters between the Appellate Committee in England and the Judicial Committee in Scotland; A O'Neill, 'Judicial Politics and the Judicial Committee; The Devolution Jurisprudence of the Privy Council' (2001) 64(4) MLR 603, 616

[258] 'The Jurisdiction of the Supreme Court of the United Kingdom in Scottish Appeals: Human Rights and the Scotland Act 2012', p1 <supremecourt.uk/docs/jurisdiction-of-the-supreme-court-in-scottish-appeals.pdf> accessed 26 February 2016.

[259] 'The Jurisdiction of the Supreme Court of the United Kingdom in Scottish Appeals', n258, p5

JCPC or the Supreme Court heard 36 full devolution issue appeals in Scottish criminal cases; 18 of which were granted leave by the High Court of Justiciary; 10 by the Supreme Court and 8 were made by law officer or High Court of Justiciary reference.[260] Although it was less common for leave to be granted by the JCPC or the Supreme Court, there was a 50% success rate in such cases. This success rate is relatively high compared to the success rates of appeals for each court, outlined at the start of this chapter. Appeals where the Supreme Court granted leave have the potential to be quite sensitive, given that the Scottish court did not necessarily accept that there was a devolution issue needing consideration by the final appeal court. Indeed, two appeals where the Supreme Court granted leave in the time period, *Cadder v HM Advocate*[261] and *Fraser v HM Advocate*[262] were both successful and sensitive, as outlined below. The statistics, nevertheless, have put to rest predictions that devolution issues would dramatically increase the workload of the Appellate Committee and thus have an adverse effect on the whole litigation system.[263]

Only 5 devolution issues arose in the time period,[264] however the small number perhaps belies the significance and impact of some of these decisions on the Scottish jurisdiction. The first devolution issue case in the Supreme Court was *McInnes v HM Advocate*,[265] pertaining to an A6 ECHR issue as a result of failures of the prosecution to disclose information at trial. Lord Hope took the opportunity, in his lead judgment, to build a relationship with the High Court of Justiciary by clearly demarcating what the limits of the court's devolution issue jurisdiction were; that being to *determine the test* to be applied by the High Court of Justiciary and not to *apply* that test.[266] Rather controversially, Lord Brown set out the position in English law and stated that he saw no reason for it to be any different under Scots law.[267] Perhaps as a method of damage limitation to the relationship with the High Court of Justiciary, in one of the first cases the Supreme Court had heard under this jurisdiction, Lord Hope explicitly stated that the law of Scotland is to be applied and that Lord Brown's comments on English law were only to be read in deciding whether non-disclosure in a criminal trial violated A6(1) of the

[260]The Jurisdiction of the Supreme Court of the United Kingdom in Scottish Appeals', n258, p5
[261]*Cadder,* n24
[262][2011] UKSC 24
[263]Mr Win Griffiths, H.C. Debs., col 927, 3 February 1998 cited by A Le Sueur, *What is the future for the Judicial Committee of the Privy Council?* (The Constitution Unit Report, UCL London, May 2001), p11-12. Lord Bingham also thought it would be a growth sector for the future; 'A New Supreme Court for the United Kingdom' (The Constitution Unit Spring Lecture, UCL, 1 May 2002) p6 <www.ucl.ac.uk/constitution-unit/files/90.pdf> accessed 12 February 2016.
[264]This accords with Poole and Shah's observations of about two such cases arising a year aside from 'a relatively high incidence of cases in 2001 and 2002'. Shah and Poole, 'The impact of the Human Rights Act on the House of Lords' [2009] PL 347, 369
[265][2010] UKSC 7
[266]*McInnes*, n265 [18]
[267]*McInnes*,n265 [36]

Convention.[268] Lord Brown clearly found it useful to compare the English position in such cases and in *Martin v HM Advocate*,[269] he again commented on how an English court would sentence the criminal conduct of driving whilst disqualified, although on this occasion he expressly acknowledged that it was 'immaterial to this appeal.'[270]

Martin was one of the core devolution issue cases that arose in the time period in terms of the significance of the constitutional issues it raised. The case related to the rise in the maximum sentence that Sheriffs could impose summarily for driving whilst disqualified and the relative competence of the Scottish Parliament to enact such a change. In particular, the judges had to consider what was meant by the words 'special to a reserved matter' in sch4 Scotland Act 1998. The Supreme Court split, including the two Scottish Justices, with Lord Hope in the majority and Lord Rodger in the dissent. The split seemed to be owing to the acknowledged difficulties that the judges had in discerning the statutory scheme.[271] If any Scottish case merited a larger panel, this perhaps would have been it, given the importance of the issues. Clarity was needed as to what the statutory wording meant and Lord Rodger clearly felt that the majority obfuscated matters further.[272] Aware of the political sensitivities, Lord Hope was keen to emphasise that the court was not deciding what should be a matter for the Scottish Parliament and what should be reserved for Westminster. That matter was determined by the rules in the Scotland Act and all the Supreme Court was tasked with was interpreting those rules.[273] Lord Hope went on to find that what was being amended was not the rule relating to maximum sentence (a reserved matter) but rather a rule of procedure as to which court may impose that maximum sentence, which was a matter for Scots law. Again, Lord Brown revealed that the majority were alert to the political effects of the decision. As the Scottish Parliament was intended to regulate its own legal system, he did not wish to read schedule 4 in such a way that would require Westminster's assistance whenever it needed to do this.[274] This would clearly interfere with the apparent autonomy of the Scottish legal system.

Cadder v HM Advocate[275] was also an extremely controversial decision, where a larger panel of seven justices was convened. It was one of the few decisions in which the Supreme Court itself granted special leave to appeal on the devolution issues and in which the decision of a unanimous

[268] *McInnes*,n265, [5]
[269] *Martin,* n24
[270] *Martin,* n24 [61]
[271] *Martin,* n24 [65] (per Lord Brown) [67] (per Lord Rodger)
[272] *Martin,* n24 [149]
[273] *Martin,* n24 [5]
[274] *Martin,* n24 [66]
[275] *Cadder,* n24

seven member High Court of Justiciary was overturned.[276] The Supreme Court found that safeguards present under Scots criminal procedure were not sufficient to ignore the Grand Chamber ruling in *Salduz v Turkey,*[277] that the lack of access to legal assistance in police custody breached A6 ECHR. The decision was to have profound consequences for the whole of the Scottish justice system as although the Supreme Court had the ability to limit the retrospective effect of an act of the Scottish Parliament, ruled to be out-with its competence,[278] there was no ability under the Scotland Act 1998 to do the same for actions of the Lord Advocate. Lord Hope, nevertheless, used the principle of legal certainty to limit the effect of the decision and ensure that closed cases were not reopened.[279]

Another controversial aspect of *Cadder* was that the Supreme Court was prepared to reject the Strasbourg line in *Horncastle* when English criminal procedure was deemed to contain satisfactory alternative safeguards in relation to the admissibility of hearsay evidence, but was not prepared to do the same where the Scottish judges felt that Scottish criminal procedure had sufficient alternative safeguards to guarantee a fair trial, despite the lack of legal assistance.[280] Lord Hope implicitly addressed what could be perceived to be unfair distinctions drawn between Scots and English law by noting that 'the admissibility of evidence is primarily a matter for the domestic legal systems …' whereas the Strasbourg court had not indicated that lack of access to a lawyer could be subject to alternative jurisdiction specific arrangements to avoid a violation of A6.[281] It was also recognised that nearly all Council of Europe members had acted on the *Salduz* ruling and that Scotland would be out of line if it did not do so.[282]

The *Cadder* decision had such a profound effect on the Scottish legal system that it prompted the enactment of the Scotland Act 2012. The Act made several amendments to the Criminal Procedure (Scotland) Act 1995 and reasserted the discrete legal role that the Supreme Court has on compatibility questions by ensuring that the High Court of Justiciary is final decision maker in the case. Thus a Supreme Court finding that the Lord Advocate carried out a Convention or EU incompatible act is no longer a nullity[283] and instead will be remitted back to the High Court of Justiciary for final determination.[284] Furthermore, the High Court of Justiciary is provided with more power to control the effect on its jurisdiction of an adverse 'compatibility issue' finding, by making

[276]*HM Advocate v McLean* [2010] SLT 73
[277](2008) 49 EHRR 421
[278]s102(2) Scotland Act 1998
[279]*Cadder,* n24 [60]
[280]See criticism of *Cadder* in J McCluskey, 'Case comment; Supreme error' [2011] Edin LR 276
[281]*Cadder,* n24 [40]
[282]*Cadder,* n24 [49]
[283]s36(2) Scotland Act 2012 amending s57(3) Scotland Act 1998
[284]s36(6) Scotland Act 2012 inserting s288AA(3) into the Criminal Procedure (Scotland) Act 1995

the relevant order instead of the Supreme Court.[285] The High Court of Justiciary is therefore able to smooth the transition to compatibility by making an order either suspending the effects of the decision until the incompatibility is remedied or to limit or remove any retrospective effects of that decision.[286] The 2012 Act also amended Scottish criminal procedure, so that any question whether an Act of the Scottish Parliament is incompatible with either the Convention or EU law[287] or whether a public authority has acted in an incompatible manner with either the Convention or EU law[288] is now a 'compatibility issue' which forms a separate statutory right of appeal.[289]

The final devolution issue case to court controversy in the time period was *Fraser v HM Advocate*,[290] where special leave was granted by the Supreme Court despite the fact that the appeal court in Scotland had refused leave on the grounds that it would result in the Supreme Court determining the merits of the case. Indeed, the appeal revealed that it was not always possible to isolate devolution issues into a discrete category without any consideration of substantive Scottish criminal matters. The Supreme Court had to determine whether an appeal against criminal conviction due to non-disclosure of evidence by the prosecution could be determined by the 'fresh evidence test' and be compatible with A6 ECHR. 'Fresh evidence appeals' in Scotland are not within the jurisdiction of the Supreme Court as they do not raise devolution issues, nevertheless the court had to consider the Fresh Evidence test to see whether it was substantially the same test as would have been applied if the appeal court had entertained the A6 argument.[291] Lord Hope, again, sought to pacify relations with Scotland by emphasising the limits to the Supreme Court's jurisdiction- to only determine devolution issues.[292] Indeed, Lord Brown specifically mentioned that Lord Hope had 'more than once' pointed this out.'[293] Therefore, contrary to the findings at the start of this chapter on the influence of the Convention on lower courts generally, the influence of the Convention in the Scottish context actually resulted in considerable strain in the institutional relationship between the final appeal court and the Scottish lower courts.

Conclusion

[285] s36(3)(b) Scotland Act 2012 inserting s102(5A) Scotland Act 1998
[286] The Jurisdiction of the Supreme Court of the United Kingdom in Scottish Appeals: Human Rights and the Scotland Act 2012 available at http://supremecourt.uk/docs/jurisdiction-of-the-supreme-court-in-scottish-appeals.pdf, p5
[287] s34(3) Scotland Act 2012 inserting s288ZA(2)(b) into the Criminal Procedure (Scotland) Act 1995
[288] s34(3) Scotland Act 2012 inserting s288ZA(2)(a) into the Criminal Procedure (Scotland) Act 1995
[289] s34(3) Scotland Act 2012 and s36(6) Scotland Act 2012 inserting s288ZA(2) and s288AA(1) into the Criminal Procedure (Scotland) Act 1995
[290] [2011] UKSC 24
[291] *Fraser,* n290 [17]
[292] *Fraser,* n290 [11]
[293] *Fraser,* n290 [45]

The Supreme Court appeared more assertive than the Appellate Committee in its relationship with the lower courts as seen in the 6% increase in the rate of overrule in the time period. The statistics also revealed that 60% of cases that were overruled in some way followed precedent. This suggests that, as a whole, the final appeal court took issue with the way the lower court applied precedent more often than it did when the lower court was law-making. An example was provided in cases that involved the executive. The overrule rate was 7% lower in cases that involved the executive compared to cases that did not involve the executive and the lower court did better in that context when it was not following precedent. Not only does this reflect the general overrule trend in the time period, it also suggests that in sensitive political cases, where there was no precedent, there was a slight tendency for the lower courts and final appeal court to put on a united front.

When the institutional influence of the ECtHR was examined another interesting trend emerged. The lower court was overruled less in human rights cases. Only 45% of such cases were overruled compared to a between 50-60% rate of overrule for other subject matters. In human rights cases, the lower court followed precedent in 71% of cases and in cases that were influenced by ECtHR jurisprudence, the lower court followed precedent in 69% of cases compared to 51% of cases that did not consider ECtHR jurisprudence. This difference was statistically significant. The lower court was clearly able to read domestic precedent better in the Convention domain, suggesting that precedent was more clearly articulated where individual rights were at stake and the jurisprudence of the ECtHR could be used for guidance. As such, the institutional influence of the ECtHR appeared to support the domestic system of precedent and the communication between the final appeal court and the lower courts. At the same time, domestic precedent in the non-Convention context could do more to support the lower courts further going forward. In this sense it is illustrative to look at the judgment characteristics found in the human rights field.

Distinguishing features of human rights cases found in Chapter 3 included the significantly longer judgments, the higher number of concurring opinions and the higher number of citations. Each of these factors could allow for a more comprehensive review of the legal implications of the judgment and could assist in clarifying the reasoning in those precedents. More concurring opinions may therefore assist the lower courts in reading domestic precedent. Occasionally, a broader approach was taken to domestic Convention cases, going wider than counsel's arguments to address Convention issues that did not arise on the facts. This goes against the traditional characterisation of UK court judgments where each case is determined based on the case in the lower court and counsel's submissions. There are clearly practical and doctrinal problems attached to making cases too broad, not least making the *ratio decidendi* even more difficult to discern. Nevertheless, the

success of the executive and the lower courts in the Convention field suggests that a slightly broader approach to providing guidance- where argument has been heard and it appears appropriate to make some more general pronouncements on the area- may actually facilitate the institutions who are guided by the judgments of the court.

The resilience of precedent in the non-Convention context was confirmed by the limited use of the *1966 Practice Direction*. However, precedent in the Convention context was more easily departed from. This suggests two things. Firstly, that overrule of a lower court following precedent was more commonly attributable to the way that the lower court *applied* or *distinguished* the precedent than to the precedent itself. Secondly, that too resilient an approach to precedent creates an 'impenetrable maze of distinctions and qualifications which destroy certainty'[294] and may explain why the lower court tended to perform best when it was free to decide matters away from the constraints of precedent or, in the Convention context, where a broader approach was taken to domestic precedent and precedent was less resistant to overrule. If these results were true of a general pattern, it would suggest that the domestic doctrine of precedent, with its particularistic and resilient approach may actually hinder institutional communication with the lower courts.

In terms of the institutional relationship with the Scottish courts, the Supreme Court was also more assertive than the Appellate Committee. The results for the respective courts show that in 9 cases arising in the Appellate Committee only 2 were overruled and 1 was reversed in part. Of the 14 cases in the Supreme Court (including devolution issues), 8 were overruled and one was reversed in part. These overrule statistics confirm that in the transitional period the final appeal court was not just a 'rubber stamp' on Scottish lower court decisions and added what *Final Appeal* would regard as *value* to the appeal.[295]

The *value* that this study suggests that the Supreme Court can add to lower court appeals is to increase the quality of precedent, through further reasoning and authority citation, to help guide the lower courts and minimise overrule in the future. In other words a lower overrule rate would be more facilitative to the court's institutional relationship with the Scottish courts. This concept of *value* was recognised in the Walker Report in its list of values used to evaluate the final appellate jurisdiction in Scotland. Walker used a mixture of 'indirect' and 'political' values alongside others that were more 'intrinsic to the legal order', such as 'democracy, fair treatment, coherence and integrity, richness of resources, expertise, detachment, operational effectiveness and economy'.[296] All of these values were not reconcilable in one model and it was concluded that 'no single model of

[294]Reid, 'The Judge as Law Maker',n98, p24
[295]Blom-Cooper and Drewry, *Final Appeal,* n1, p380

appellate jurisdiction … provides an optimal institutional expression of any of these values,' with different solutions promoting different values.[297] Nevertheless the optimal model would try to reconcile as many of these values as possible.

The 'operational effectiveness and efficiency' value was clearly supported by the shorter and more expeditious delivery of judgments originating in the Court of Session. Furthermore, the 'coherence and integrity' of the domestic UK legal systems was respected by the selective use of the 'rich resources' of the English common law. English authorities were modestly reviewed in cases where the separate legal systems were recognised to align. Where UK coherence was required, Scottish resources (if not authorities) were cited in English cases. The 'expertise' value was also deployed in a way that would be positively regarded by Walker. This was seen in allowing specialist English judges to lead on Scots law cases that engaged the English judge's specialism. Whilst these judges may lack 'expertise' in Scots' law, the convention of two Scottish judges sitting on Scottish cases was observed even more assiduously than in the past and where it was not observed, a Scottish judge was always present. Furthermore, the high levels of unanimity in Scottish cases in the time period meant that in only one case, *Martin and Miller*, could concern be raised over the expertise of the majority judgment, with the two Scottish judges differing in opinion.

Chalmers has suggested that, 'Scottish and English law lords do not approach distinctively Scottish issues on equal terms.'[298] This accusation relates to Walker's value of 'fair treatment' of Scots' appeals. The data revealed that Scots cases were treated differently. As we have seen, appeals were more likely to be unanimous, shorter in length, delivered in a quicker period of time and often with a single judgment. In addition, Scottish judges were proportionately more active on Scots law appeals in both sitting and providing judgment. Should the preliminary conclusions in this thesis be correct, that longer judgments with a greater number of opinions and citations actually serves to increase the quality of the reasoning and the guidance to lower courts, then the judgment style favoured in the Scottish context could hinder institutional guidance in the future and perhaps lead to an increased rate of overrule. In this sense, Scottish appeals may not be receiving full 'value' from the Supreme Court and institutional relations may be compromised in the future as a result.

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[296]Walker Report, n12, p48
[297]Walker Report, n12, p62-63
[298]Chalmers, 'Scottish appeals and the proposed Supreme Court', n181, p10

Institutional relationships with Scotland may already be compromised in the devolution issue context. Both *Cadder* and *Fraser* were not received well by Scottish nationalists[299] and the adverse publicity could well have been damaging to the infantile institutional relationship between the Supreme Court and the High Court of Justiciary. *Cadder* was so controversial, that legislation was promptly enacted to address its effects. Indeed, the Supreme Court's judgments in devolution issue cases were marked by an awareness of the sensitivities surrounding the jurisdiction and the repeated emphasis on the limits of that jurisdiction. This sensitivity may have been the reason why a panel of devolution issue expertise was formed. Lords Brown and Kerr sat on all 5 devolution issue appeals alongside the 2 Scottish Law Lords, with Lord Brown providing a judgment in 4 of these cases. Lord Walker also sat on 4 of the 5 cases.[300] This suggests that not only was the Supreme Court keen to observe the Convention of two Scottish Justices in such cases, it also wished to keep the English Justices that sat on such cases consistent, perhaps in an attempt to build a level of specialist expertise in devolution matters amongst the English judges. Rachel Cahill O'Callaghan has profiled the Supreme Court judges based on the personal values they demonstrated in close call judgments in the first 4 years of the Supreme Court. Interestingly, in her analysis of the *Jewish Free Schools case,* she found that Lords Walker, Hope, Rodger and Brown all espoused 'traditionalist' values in their dissenting opinion in that case.[301] This may, tentatively, suggest that these English judges were selected to hear devolution issue cases as they shared similar personal values to the Scottish judges and were less likely to divide in this politically sensitive area. Whilst this may be speculation, what is clear is that the Supreme Court took a very assertive stance and exercised its institutional power fairly liberally over the Scottish lower courts in devolution issues in the time period. The success rate of devolution issues was around 40% in the time period and higher than reported in the past.[302]

In summary, the Supreme Court overruled the Scottish courts as well as the lower courts more frequently than the Appellate Committee in the time period. It has been suggested that a way of

[299]Statement made by Scottish Justice Secretary Kenny MacAskill on the Cadder judgment to Scottish Parliament on 23 February 2011. Official Report <www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=6245&i=56926#ScotParlOR> accessed 3 December 2015. 'Supreme Court threat to Scots Law- Alex Salmond', The Scotsman, 25 May 2011 <www.scotsman.com/news/supreme-court-threat-to-scots-law-alex-salmond-1-1655512> accessed 3 December 2015.

[300]In *Allison v HM Advocate* [2010] UKSC 6 Lord Rodger leads and Lord Hope gives a concurring opinion, in *McInnes*, n265, Lord Hope leads and Lords Brown and Rodger provide a concurrence. In *Martin,* n24, Lord Hope leads and Lord Brown provides a concurrence with Lords Rodger and Kerr providing dissenting opinions. In *Cadder,* n24, Lord Hope leads and Lord Brown provides a concurrence and in *Fraser,* n290, Lord Hope leads and Lord Brown provides a concurrence.

[301]R Cahill-O Callaghan, 'The influence of Personal Values on Legal Judgments' (2013) 40(4), Brit.J.L. & Soc., 596, 610

[302]Shah and Poole found it to be 22% in their time period;'The impact of the Human Rights Act on the House of Lords', n89, 369

reducing overrule going forward- and potentially improving institutional relations with the lower courts- would be to improve the functioning of the system of precedent. In this regard, lessons could be taken from the domestic jurisprudence under the Convention, where the lower court appeared more successful at applying precedent. Devolution issue judgments are characterised by the fact that they involve consideration of the Convention cases as well as by their Scots' law origin and it may be that as the jurisdiction develops, a more detailed body of domestic jurisprudence will assist in guiding the lower court in this context. Scottish precedent more generally could, nonetheless, do more to provide 'value' to that jurisdiction.

Chapter 6; Relationship with the European Courts

The integral link between the final appeal court and the ECtHR was evident in the preceding chapters which highlighted the significant effect that the influence of the ECtHR had in the time period on the administrative efficiency and judgment style adopted by the court. The Convention's influence also affected the court's domestic institutional relationships, particularly its review of executive decision-making and its ability to communicate with the lower courts through precedent. In this sense, the institutional influence of the ECtHR and a Convention matter seemed to have as great an effect on institutional relations as the changeover from the Appellate Committee to the Supreme Court. This final chapter builds upon these conclusions and concludes the evolving narrative by looking at the empirical data collected specific to the institutional relationship between the final appeal court and the European courts and the effect that this had on the administrative efficiency of the court as well as the institutional relationships already discussed.

The broad structure of 'overrule' and 'precedent' was used in Chapter 5 to review the relationship between two legal institutions. 'Overrule' is, however, not a term that best describes the institutional relationship between the final appeal court and the European courts. Neither European court can legally overrule a domestic judicial decision. Nevertheless, the legal mechanisms that govern the court's respective relationships with these two European courts ensure that their jurisprudence is implemented in domestic cases. The final appeal court is obliged to 'take into account' the jurisprudence of the ECtHR under s2 HRA and is able to refer a matter to the CJEU for a preliminary ruling under A267 Treaty of the Functioning of the European Union (TFEU) on the interpretation of the EU Treaties. Even when a reference is not made, the top court has a continuing obligation under s3 ECA to determine the matters at hand 'in accordance with the principles laid down by and any relevant decision of the European Court.' Nicol suggests that a common feature of both the ECA and the HRA is that each liberalises the judges from the traditional approach to precedent. Section 3 of the ECA achieves this by establishing, '… a rival pole of authority in the form of the European Court of Justice' which has the ability to override the force of domestic precedent in the context of the European legal order while s2 HRA does so by requiring the Convention jurisprudence to be 'taken into account'.[1] In this sense, both courts can influence domestic precedent.

[1]D Nicol, 'Law and Politics after the Human Rights Act' [2006] PL 722, 730

The themes of overrule and precedent remain useful umbrella concepts subject to a degree of contextual adjustment and focus to see how the relationship with the European courts specifically impacted upon the domestic relationships and administrative efficiency of the court. The 'overrule' section for the CJEU reviews the CJEU reference cases in the time period, specifically with a view to establishing how making a reference to the CJEU affected the administrative efficiency and the style of judgment produced by the court. The 'overrule' section for the ECtHR reviews how often the ECtHR line of authority was followed, rejected or the judges were unclear of the correct reading of the Convention jurisprudence, to establish how this affected administrative efficiency and the relative success of the lower courts and the executive in the time period. The precedent section for the CJEU is relatively succinct as CJEU authorities, unlike the jurisprudence of the ECtHR, were only cited when a CJEU reference was considered and therefore did little to impact upon the administrative efficiency or institutional relationships of the final appeal court. The precedent section for the ECtHR uses the volume of ECtHR citations in each appeal as one measure of the extent of the review of ECtHR authority and attempts to gauge whether the breadth of review of ECtHR jurisprudence and associated reasoning was related to the success of the lower court or the executive in the field.

Relationship with CJEU

'Overrule in the CJEU context'; The Reference Procedure

The reference procedure is the mechanism by which the jurisdiction of the CJEU on interpretation of the treaties is maintained:

> Community Law requires that the Supreme Court (as the domestic court of last resort) *should* refer to the Court of Justice of the European Union any doubtful questions of Community law necessary to its decision.[2]

The obligatory nature of the word *should* perhaps masks the discretion that the final appeal court still exercises to determine whether referring a matter is *necessary to its decision*. The national courts are viewed as being in the best position to determine whether, based on the facts of the case before them, they need to make a reference in order to resolve *that particular matter*. In deciding whether a reference is *necessary* the court takes its guidance from *Case C283/81 CILFIT v Ministry of Health* as outlined in *Practice Direction 11; The Court of Justice of the European Union at paragraph 11.1.2*;

> The CJEU … made clear that no reference need be made …: a. where the question raised is irrelevant. b. where the European Union law provision in question has already been interpreted by the CJEU; c. where the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case; or d. where the correct application of European Union law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question of interpretation or validity is to be resolved.

The latter sentence is known as the *acte clair* principle and affords the final appeal court some discretion as to whether or not to make a reference.

Table 1 records the references that were made to the CJEU across all four sessions. The data differentiates between cases that made a reference or responded to a previous reference, cases where it was decided not to make a reference and cases where a reference was not applicable on the facts. The Supreme Court had more interaction with the CJEU than the Appellate Committee by making a greater number of references and having more opportunity to make references. A reference was only made in 4 cases in the Appellate Committee, compared to 7 cases in the Supreme Court. By contrast, a reference was declined in 9 cases in the Appellate Committee, compared to 14 such cases in the Supreme Court. Both courts, therefore, declined to make a reference on around twice the number of occasions that it made a reference. This empirically reflects the final appeal court's ability to decline to make a reference in cases where the matter is not necessarily *acte clair*, provided the appeal can be answered without the need to resolve that uncertainty.[3] It also reflects a judicial reluctance to cause further delay by making a reference.[4] In this sense, the institutional relationship with the CJEU is not of such a reciprocal nature that the final appeal court is required to alert the CJEU to instances where the interpretation of the treaties needs clarification, provided that clarification is not required in order to answer the appeal at hand. If references were required every time the treaties required clarification, the delays in making a reference would be even more substantial and detrimental to the system as a whole.

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[2] UKSC PD 1; *Jurisdiction of the Court* at 1.2.26

[3] See e.g. *R (on the application of Countryside Alliance) v Attorney General* [2007] UKHL 52 [35] (per Lord Bingham); *R (on the application of Edwards) v Environment Agency* [2008] UKHL 22 [58] (per Lord Hoffman) and the division in the court over whether the matter was *acte clair* in *Office of Fair Trading v Abbey National* [2009] UKSC 6

[4] *OFT,* n3 [48] (per Lord Walker)

Table 1. Frequency of Reference to the CJEU by Court and by Session

Was a reference made to the CJEU?			Session the case was heard in: HL 2007-2008	HL 2008-2009	SC 2009-2010	SC 2010-2011	Total
Not applicable	House of Lords or Supreme Court	House of Lords	69	47	0	0	116
		Supreme Court	0	0	48	48	96
	Total		69	47	48	48	212
Yes	House of Lords or Supreme Court	House of Lords	2	2	0	0	4
		Supreme Court	0	0	4	3	7
	Total		2	2	4	3	11
No	House of Lords or Supreme Court	House of Lords	8	1	0	0	9
		Supreme Court	0	0	5	9	14
	Total		8	1	5	9	23
Total	House of Lords or Supreme Court	House of Lords	79	50	0	0	129
		Supreme Court	0	0	57	60	117
	Total		79	50	57	60	246

The substantial delay caused when making a reference was supported by the empirical data. Table 2 demonstrates that a reference to the CJEU considerably lengthened the judgment gap and this difference was statistically significant.[5] A degree of caution should be exercised in relation to these results as the 'reference case' sample size was small and the 'reference made' statistics covered cases where a reference was made and also cases where the court was responding to a reference already made. In the latter instance, the judgment gap was a lot larger and so the standard deviation figure was high. The results nevertheless confirm that there was significant delay associated with making a reference to the CJEU. The practical effects of this delay are not, however, insurmountable

[5] $F(2,242) = 16.06$, $p < 0.0001$

and the court still had the option to dispose of certain parts of the appeal that were not dependent on the outcome of the reference.[6]

Table 2. Reference to the CJEU and Average Judgment Gap

Was a reference made to the CJEU?	Mean	N	Std. Deviation
Not applicable	75.51	211	43.022
Yes	251.27	11	449.008
No	84.87	23	36.144
Total	84.28	245	106.288

The efficiency measures, aside from judgment gap, were more negatively affected in appeals that declined to make a reference. Table 3 reveals that the length of the hearing increased significantly[7] in these cases and the resulting judgments were, on average, longer than those judgments that either made a reference or where a reference was not applicable. By contrast, where a reference was or had already been made to the CJEU, the hearing was quite short. A case making a reference dealt simply with the circumstances surrounding the need for a reference. Similarly, a case where a reference had already been made usually only required analysis of the answer provided by the CJEU and application to the facts, with limited scope for differing viewpoints or interpretation. These judgments were therefore half the length of those judgments where a reference to the CJEU was declined and the difference was statistically significant.[8]

Table 3. Reference to the CJEU, Average Length of Case and Average Length of Judgment

Reference to CJEU		N	Mean	Minimum	Maximum
No of days case lasts for	Not applicable	212	2.03	1	6
	Yes	11	1.55	1	2
	No	23	2.61	1	6
	Total	246	2.06	1	6
Length of case in pages	Not applicable	212	32.95	4	129
	Yes	11	16.27	4	35
	No	23	43.26	14	92
	Total	246	33.17	4	129

[6] UKSC R42

[7] $F(2, 239) = 5.92$, $p = 0.003$. The post hoc tests revealed that the difference between cases which referred to the CJEU and those that did not were statistically significant (Mean difference = -0.909, $p < 0.05$, 95%CI -1.62 to -0.20).

[8] $t(32) = 2.38$, $p = 0.004$

The findings on length of judgment in Table 3 were supported by those relating to concurring and dissenting opinions. Table 4 shows that the judgments that decided not to make a reference included 5 times more concurring opinions than judgments where a reference was made. This result was statistically significant.[9] It is clear that the increased judgment length in cases that decide not to make a reference was at least partly attributable to a greater number of judges wishing to provide judgment. This is in stark juxtaposition to cases that made a reference, 82% of which were issued as a single judgment (see Table 6). Table 5 also demonstrates that cases that decided not to refer a matter to the CJEU had a slightly higher dissent rate. The numbers returned, however, were too small for any further analysis.

Table 4. Reference to the CJEU and Average Number of Concurring Opinions

	N	Mean	Std. Deviation
Yes	11	.45	1.036
No	23	2.43	1.903
Total	34	1.79	1.903

Table 5. Reference to the CJEU and Average Number of Dissenting Opinions

Was a reference made to the CJEU?	Mean	N	Std. Deviation
Not applicable	.44	212	.882
Yes	.00	11	.000
No	.74	23	1.054
Total	.45	246	.887

Table 6. Reference to the CJEU and Single Judgments

		Was the case a single judgment case?			
		No	Yes-composite or collective judgment	Yes- Single judgment with others only formally concurring	Total
Was a reference made to the CJEU?	Not applicable	163	32	17	212
	Yes	2	7	2	11

[9] $t(32) = 3.21$, p 0.003

	No	20	1	2	23
Total		185	40	21	246

The adjustment in judgment style in reference cases provided the CJEU with a single, unanimous and relatively succinct opinion from the final appeal court and reflects to a large extent the civilian style of judgment that the CJEU is used to. The CJEU does not issue dissenting opinions and therefore seeks as far as possible to provide clarity in its response to Member State references. The CJEU judgment- and the domestic reference to it- are not part of an evolving body of precedent and instead are modelled on the need for certainty i.e. a clear question and definitive answer to the question raised. Lee suggests that this civilian, reflective style of reasoning where the outcome is determined and then 'reasoned accordingly,' combined with a single judgment style is likely to lead to a compromised judgment 'devoid of adequate reasoning and … reduced to bald assertions of the law without justification.'[10] Lord Neuberger also believes that CJEU compulsory unanimity has resulted in CJEU judgments that can be 'incomprehensible', 'have internally inconsistent reasoning' and/or 'do not answer the question referred.'[11] There were only two cases that responded to a CJEU reference in the time period, which was not enough to establish whether the more limited nature of the jurisprudential reasoning in CJEU cases had a detrimental effect on the ability for the lower courts and the executive to direct themselves accordingly. Interestingly, however, the lower court was overruled in both the appeals that responded to a CJEU reference in the time period and there was technically[12] a finding against the executive in both instances.[13]

Precedent in the CJEU context

The civil law approach to reference cases was reflected in the level of CJEU citations across all appeals. Table 7 demonstrates that CJEU case citations only really occurred in cases that either made a reference or considered making a reference.

[10] J Lee, 'A Defence of Concurring Speeches' [2009] PL 305, 326

[11] Lord Neuberger, 'No judgment-No Justice' (Bailli lecture, 20 November 2012) [25] <www.supremecourt.uk/docs/speech-121120.pdf> accessed 22 February 2016

[12] *Stringer* this was not coded as involving the Executive as it was not a public decision of HM Revenue's that was the subject of the complaint but rather HM Revenue's actions in their capacity as an employer of Mr Stringer.

[13] *Marks and Spencer plc v HM Customs & Excise* [2007] UKHL 8 and *HMRC v Stringer* [2009] UKHL 31

Table 7. Reference to the CJEU and Average Number of CJEU Citations

Was a reference made to the CJEU?	Mean	N	Std. Deviation
Not applicable	.09	212	.420
Yes	6.27	11	5.002
No	6.61	23	7.297
Total	.98	246	3.297

This could be read as the final appeal court perhaps not undertaking as comprehensive a review of CJEU authorities as required by s3 ECA 1972 to ensure that the principles laid down by the CJEU are followed at all times. The low level of CJEU citations also demonstrates, in a tangible manner, the difference in the legal framework that governs the institutional relationship between each of the European courts and the final appeal court in that the authoritative nature of the CJEU's interpretation of the treaties prevents anything resembling a domestic jurisprudence of treaty interpretation under the ECA, as exists under the HRA. Indeed, the level of CJEU citations in the reference context was low compared to the average volume of ECtHR citations recorded in human rights cases.[14] The CJEU's authoritative answers to the interpretation of the treaties are designed for direct application. This is to be contrasted with the more general pronouncements of the requirements of the Convention by the ECtHR, the detail of which will often require substantiating before application in the domestic context,[15] and which affords to national authorities a margin of appreciation in securing the requirements of the Convention.[16] Again, CJEU citations were marginally higher in cases that declined to make a reference, although not significantly. This slight increase cannot support any firm conclusions, however it may reflect the fact that domestic decisions that declined to make a reference, with their increased instance of concurrences and dissent, reflected a more common law style of judgment- which was found in chapter 3 to include higher citation levels.[17]

Overall therefore, CJEU judgments are not characterised by their need to reason through different authorities and develop jurisprudence on the basis of those authorities. Ironically, however, where a case declined to make a CJEU reference, the process of reasoning required to justify that a matter was *acte clair* appeared to enhance the common law characteristics and reasoning in those domestic

[14]See tables in text at Chapter 3, n101
[15]See *Doherty v Birmingham City Council* (2008) UKHL 57 [20] (per Lord Hope). Hale, 'Argentoratium Locotum: Is the Supreme Court supreme?' (Nottingham Human Rights Lecture 2011, 1 December 2011) p4 <www.supremecourt.gov.uk/docs/speech_111201.pdf> accessed 8 December 2011
[16]See *Handyside v UK* (1976) 1 EHRR 737 [48-49]
[17]See tables in text at Chapter 3, n101

judgments. Indeed, it is the latter style of judgment that has been seen to support institutional relations in this thesis, as was particularly evident in the context of the Convention and the jurisprudence of the ECtHR.

Relationship with Strasbourg

The Proportion of Human Rights cases

Human rights appeals did not occur as often as domestic constitutional and public law appeals in the time period. Table 8 reveals that the Appellate Committee dealt with more human rights cases than the Supreme Court, accounting for 20% of the Appellate Committee caseload compared to 14.5% of the Supreme Court caseload.[18] The other categories of case remained roughly equal as between the two courts. This overall decline in human rights appeals was largely attributable to a dramatic fall in the number of human rights cases that arose in Supreme Court session 2010-2011 (see Table 9). The methodological limitations of a short time period make it vulnerable to annual variations and this sessional drop may not be indicative of a more general downward trajectory in the number of human rights appeals in the Supreme Court compared to the Appellate Committee. Nevertheless appeals arising in this session are likely to have been granted leave by the Supreme Court rather than the Appellate Committee and the results may suggest a more cautious approach by the Supreme Court Appeals Committee to granting leave in human rights cases in the fledgling years of the court.

Table 8. Subject Matter of Cases by Court

		Case_Type				
		HR	DCAPL	LOPL	INT	Total
House of Lords or Supreme Court	House of Lords	26	56	31	16	129
	Supreme Court	17	55	30	15	117
Total		43	111	61	31	246

[18] This is lower than previous findings that human rights cases constituted 28% of the court's workload following the introduction of the HRA. See Shah and Poole, 'The Impact of the Human Rights Act on the Law Lords' [2009] PL 347, 364

Table 9. Subject Matter of Cases by Session

		Case_Type				
		HR	DCAPL	LOPL	INT	Total
Session the case was heard in	HL 2007-2008	13	37	16	13	79
	HL 2008-2009	13	19	15	3	50
	SC 2009-2010	11	28	10	8	57
	SC 2010-2011	6	27	20	7	60
Total		43	111	61	31	246

Table 10 demonstrates that all human rights judgments bar one considered Convention jurisprudence. Interestingly, the one human rights case that did not consider any Convention jurisprudence was a devolution issue case.[19] This unusual result lends support to the suggestion that devolution issue cases are a discrete category of case where the judgments are often characterised more by their Scots law heritage, than the fact they raise Convention issues. Table 10 also confirms that it is not just human rights cases that will be influenced by the indirect institutional involvement of the ECtHR. Domestic, constitutional and public law matters will also often consider ECtHR jurisprudence and, on occasion, so too will private law matters. As such, the lower numbers of human rights cases in the Supreme Court did not necessarily mean that that court was less engaged with the ECtHR over the time period.

Table 10. Subject Matter and following the Strasbourg Line

		Does the case follow Strasbourg line of authority?				
		Not applicable	Yes	No	Justices unsure of what Strasbourg line is	Total
Case_Type	HR	1	30	3	9	43
	DCAPL	90	19	0	2	111
	LOPL	54	6	0	1	61
	INT	25	4	0	2	31
Total		170	59	3	14	246

'Overrule' in the ECtHR context

[19] *Allison v HM Advocate* [2010] UKSC 6

The duty to 'take into account' ECtHR jurisprudence under s2 HRA means that the jurisprudence of the ECtHR is not strictly binding in domestic proceedings. However, domestic courts have generally sought to apply 'clear and constant' jurisprudence of the ECtHR.[20] In this sense, the jurisprudence of the ECtHR is able to direct the substantive outcome of domestic cases. This remained largely demonstrable during the time period and where ECtHR authority was 'clear' it was generally followed. However, the data also evidences the not insubstantial number of occasions where the ECtHR jurisprudence was not 'clear' and the judges were uncertain over how to apply the ECtHR authorities in the context of the case before them.[21] In these situations the court had to take a slightly more constructive approach to interpreting the jurisprudence of the ECtHR and where necessary fill in any jurisprudential gaps. These cases were coded as 'the judges being uncertain as to the Strasbourg line'. In cases where ECtHR authority was considered, 81% followed the line taken by the ECtHR in the Appellate Committee compared to just 73% in the Supreme Court. The lower figure for the Supreme Court can be explained by the fact that in almost a quarter of occasions where Convention jurisprudence was considered in that court, the ECtHR authority was unclear. This was only noted in 14% of cases in the Appellate Committee. The differences recorded may not be so much down to an institutional difference, as to the differences in caseload arising in any given session. There was a slight drop in cases that followed the ECtHR line between sessions 2007-08 and 2008-09 at 84% and 78% respectively and then a further decrease to 62.5% in the Supreme Court session 2009-2010 before increasing again to 82%. As such, the levels of clarity in the ECtHR line in the final year of the Supreme Court were in line with the first year in the Appellate Committee. Furthermore, both courts generally followed ECtHR authority where it was clear.

Table 11. Following the Strasbourg line by Court

	Does the case follow Strasbourg line of authority?				
	Not applicable	Yes	No	Justices unsure of what Strasbourg line is	Total
House of	86	35	2	6	129

[20] *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26 [20] (per Lord Bingham) approving obiter comments of Lord Slynn in *R (Alconbury Developments Ltd) v Secretary of State for the Environment and the Regions* [2001] UKHL 23 [23]

[21] Examples include in *R (on the application of Wellington) v Secretary of State for the Home Department* [2008] UKHL 72 where the court tried to reconcile two ECtHR authorities to determine whether an 'absolutist' or 'relativist' approach should be taken to A3. In *Austin v Commissioner of the Police* [2009] UKHL 5 [20] (per Lord Hope) there was an acknowledged grey area as to what amounted to a deprivation of liberty under A5. In *RB(Algeria) v Secretary of State for the Home Department* [2009] UKHL 10 [133] (per Lord Phillips) there was a lack of reported cases and 'authoritative guidance' as to what amounted to a flagrant breach under A6.

	Lords Supreme Court	84	24	1	8	117
Total		170	59	3	14	246

It therefore remained rare for the judges to reject the ECtHR line of authority and this only occurred in the Appellate Committee in *R (on the application of Animal Defenders) v Secretary of State for Culture, Media and Sport,*[22] to a lesser extent in *Doherty v Birmingham City Council*[23] and in the Supreme Court case of *R v Horncastle*[24] during the period. No case made the bold political statement of declining to follow a Grand Chamber decision and in *Horncastle* it was made clear that it would only be on 'rare occasions' where it is not clear that 'the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process' that this would be appropriate.[25] In *Manchester City Council v Pinnock*,[26] Lord Neuberger indicated that 'in theory' the court could depart from a Grand Chamber decision, however since then Lord Mance has confirmed the very specific and rare circumstances where this would be considered:

> It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level.[27]

Laws LJ has criticised *Chester* as endorsing the *Ullah* approach which he regards as, 'deference to Strasbourg … quite unwarranted by the statute.'[28] Instead, Laws LJ advocates the intrinsic value in domestic courts putting forward their 'own initiatives in the field,'[29] both from the perspective of the development of Convention law and domestic constitutional law. Laws is not alone in the view that the development of the domestic jurisprudence under the HRA need not 'mirror'[30] that developed under the Convention by the ECtHR and that s2 allows for a more 'progressive'[31] approach to

[22][2008] UKHL 15
[23][2008] UKHL 57. There was a partial rejection of the Strasbourg line in this case. Even though *McCann v UK* endorsed the reasoning of the minority in *Kay v Lambeth LBC* [2006] UKHL, the Lords refused to depart from the majority approach and instead tried to give effect to the ECtHR ruling through applying and developing the majority reasoning. This was 'as consistent as domestic law allows us to be with … *Connors* and *McCann*.' [19] (per Lord Hope)
[24][2009] UKSC 14
[25]*Horncastle*, n24 [11] (per Lord Phillips)
[26][2011] 2 AC 104 [48]
[27]*R (on the application of Chester) v Secretary of State for Justice* [2013] UKSC 63 [27]
[28]*R(Chester)*, n27, p80
[29]Laws LJ, *The Common law Constitution*, Hamlyn Lectures (CUP, 2014) p82
[30]J Lewis, 'The European Ceiling on Human Rights' [2007] PL 720
[31]R Masterman, 's2(1) of the Human Rights Act 1998; binding domestic courts to Strasbourg? (2004) PL 725

domestic jurisprudence under the HRA.[32] Nevertheless, the data appears to suggest that the Supreme Court has not obviously adopted this more 'progressive' approach in the time period.

When the ECtHR jurisprudence was not 'clear' or 'constant', the final appeal court was provided with the opportunity to 'act on its own initiatives' by having to constructively carve a domestic jurisprudential path through the ECtHR citations. As outlined above, this constructive role was undertaken more often in the Supreme Court than the Appellate Committee in the time period. A lack of clarity over the ECtHR line certainly led to an increased level of judicial participation in terms of providing judgment. The significantly higher number of concurring opinions found in human rights cases in chapter 3 increased further still, although not significantly,[33]when the ECtHR line was unclear.

Table 12. Following the Strasbourg Line and Average Concurring/ Dissenting Opinions

Does the case follow Strasbourg line of authority?		No of concurring opinions provided in the case	No of dissenting opinions provided in the case
Not applicable	Mean	1.89	.43
	N	170	170
	Std. Deviation	1.687	.876
Yes	Mean	2.58	.42
	N	59	59
	Std. Deviation	1.850	.875
No	Mean	2.00	.00
	N	3	3
	Std. Deviation	1.000	.000
Justices unsure of what Strasbourg line is	Mean	3.21	.93
	N	14	14
	Std. Deviation	1.805	1.072
Total	Mean	2.13	.45
	N	246	246
	Std. Deviation	1.763	.887

[32]See Lord Irvine, 'A British Interpretation of Convention rights'(Bingham Centre for the Rule of Law Lecture, 14 December 2011) < www.ucl.ac.uk/laws/judicial-institute/files/British_Interpretation_of_Convention_Rights_-_Irvine.pdf> accessed 22 February 2016; Masterman, *The Separation of Powers in the Contemporary Constitution* (CUP, Cambridge, 2011)

[33]$F(2,73) = 0.90$, $p = 0.41$

The overall unanimity rate decreased from 77% to 70% in cases that considered ECtHR jurisprudence (Table 13).[34] However, Table 12 demonstrates that the dissent rate was at its greatest, although not significantly,[35] when the ECtHR line was unclear. By contrast, the dissent rate for cases that followed the ECtHR line was almost identical to cases that did not involve consideration of ECtHR jurisprudence. The Justices also presented a united front to the ECtHR when they sought to reject its line of authority.

Table 13. Consideration of Strasbourg Jurisprudence and Unanimity of Final Appeal Court

			SCHL Unanimity		
			SC/HL Divided	SC/HL Unanimous	Total
Strasbourg Influence	No	Count	40	130	170
		% within Strasbourg Influence	23.5%	76.5%	100.0%
		% within SCHL Unanimity	63.5%	71.0%	69.1%
	Yes	Count	23	53	76
		% within Strasbourg Influence	30.3%	69.7%	100.0%
		% within SCHL Unanimity	36.5%	29.0%	30.9%
Total		Count	63	183	246
		% within Strasbourg Influence	25.6%	74.4%	100.0%
		% within SCHL Unanimity	100.0%	100.0%	100.0%

As well as impacting on judgment style, unclear ECtHR jurisprudence had a direct impact on the efficiency measures reviewed in Chapter 3. Table 14 demonstrates that the hearing length was at its longest where the ECtHR line was unclear, suggesting that a longer time was needed to hear argument on the correct approach to the ECtHR jurisprudence domestically and to consider and reason through the authorities. The average difference between a case that did not consider ECtHR jurisprudence and one where the ECtHR authority was unclear was as much as half a day. This was statistically significant.[36]

[34]This suggests a different result to Shah and Poole's findings that dissent declined from 38% to 22% in human rights cases; The Law Lords and Human Rights (2011) 74(1) MLR 79,90
[35]$t(242) = 1.30$, $p = 0.17$
[36]$F(3, 242) = 3.37$, $p = 0.019$

Table 14. Following the Strasbourg Line and Average Length of Case

Does the case follow Strasbourg line of authority?	Mean	N	Std. Deviation
Not applicable	1.94	170	.826
Yes	2.31	59	1.118
No	2.00	3	1.000
Justices unsure of what Strasbourg line is	2.50	14	1.160
Total	2.06	246	.939

Table 15 also demonstrates that the reduction in judgment gap in human rights cases was much more pronounced in cases that followed the ECtHR guidance compared to where the ECtHR line was unclear. This confirms earlier findings that clear precedent aids judgment writing and suggests that judgments where the ECtHR jurisprudence was unclear were potentially more complex to write, given the need to reason through the Convention jurisprudence before trying to synthesise it with domestic sources. The judges may also differ in how best to achieve this, as seen in the higher dissent rate when the ECtHR line was unclear. The longest average judgment gap in human rights cases was where the ECtHR line was rejected, which was even longer than in cases where human rights was not applicable. Nevertheless, as this only applied to 3 cases in the time period, the 95% confidence interval was wide and so no statistical comparisons could be made.

Table 15. Following the Strasbourg Line and Average Judgment Gap

	Mean	N	Std. Deviation	Minimum	Maximum	95%CI(l)	95%CI (u)
Not applicable	87.73	169	125.811	7	1331	68.76112	106.6989
Yes	73.31	59	34.569	1	167	64.48804	82.13196
No	126	3	36.097	85	153	85.15164	166.8484
Justices unsure of what Strasbourg line is	79.93	14	28.827	36	126	64.83016	95.02984
Total	84.28	245	106.288	1	1331	70.9716	97.5884

Table 16 demonstrates that there were clear differences between the average judgment length depending on whether the ECtHR line was followed or not, with judgments that followed ECtHR authority being almost half the length of those that declined to follow ECtHR authority. Indeed, the judgment length for cases that followed clear ECtHR jurisprudence was slightly less than the overall mean judgment length for the Supreme Court in the time period (35.37). An analysis of variance

(ANOVA) revealed a statistically significant difference between the average judgment lengths,[37] with the *post hoc* Bonferroni test (see Table 17) demonstrating that there was a significant difference in judgment length between cases that followed clear ECtHR guidance and cases where the ECtHR line was unclear.[38] As only 3 cases did not follow ECtHR jurisprudence, no statistically significant results were returned for the increased judgment length in those cases.

Table 16. Following the Strasbourg Line and Average Length of Judgment

Does the case follow Strasbourg line of authority?	Mean	N	Std. Deviation
Yes	34.59	59	17.183
No	60.67	3	28.361
Justices unsure of what Strasbourg line is	55.64	14	34.234
Total	39.50	76	23.204

Table 17. Post hoc Bonferroni tests for following the Strasbourg Line and Average Length of Judgment

(I) Does the case follow Strasbourg line of authority?	(J) Does the case follow Strasbourg line of authority?	Mean Difference (I-J)	Std. Error	Sig.	95% Confidence Interval	
					Lower Bound	Upper Bound
Yes	No	-26.073	12.767	.134	-57.36	5.21
	Justices unsure of what Strasbourg line is	-21.050*	6.413	.005	-36.76	-5.34
No	Yes	26.073	12.767	.134	-5.21	57.36
	Justices unsure of what Strasbourg line is	5.024	13.724	1.000	-28.60	38.65
Justices unsure of what Strasbourg line is	Yes	21.050*	6.413	.005	5.34	36.76
	No	-5.024	13.724	1.000	-38.65	28.60

*. The mean difference is significant at the 0.05 level.

Table 18 reveals that the ECtHR jurisprudence was unclear in 20% of 5 justice panel cases that considered Convention jurisprudence, compared to just 7% of cases involving 7 justice panels and 14% of cases involving 9 Justices. This indicates that either a larger judicial panel tended to be convened in cases where the ECtHR jurisprudence was clear or the effect of a larger panel- and perhaps more judicial minds devoted to the case- was to demystify the jurisprudence of the ECtHR.

[37] $F(2,73)=6.89$, $p = 0.002$
[38] Mean difference =21.05, p 0.005

A larger sample would be required before any firm conclusions can be drawn however it appears that the increased frequency of larger panels in the Supreme Court may assist in reasoning through the ECtHR jurisprudence going forward. That said, the greater frequency with which larger panels were convened in the Supreme Court did not have the net effect of reducing the instances where the ECtHR line was unclear in that court in the time period. More clarity in ECtHR jurisprudence could allow for more single judgments in the Convention context. Of 11 single judgments that considered Convention jurisprudence, the ECtHR line was unclear in only 1 appeal. Single judgments, therefore, appeared to be more appropriate in cases where the ECtHR jurisprudence was clear. Three of the enlarged judicial panel cases in the Convention context (one 9 justice panel and two 7 justice panels) were also single judgments.

Table 18. Following the Strasbourg Line and Panel Size

		Does the case follow Strasbourg line of authority?				
		Not applicable	Yes	No	Justices unsure of what Strasbourg line is	Total
Panel	3 justices	2	0	0	0	2
	5 justices	148	46	2	12	208
	7 justices	13	7	1	1	22
	9 justices	6	6	0	1	13
Total		169	59	3	14	245

It is evident that when the ECtHR line was unclear, it exacerbated the impact on the administrative efficiency of the court of human rights cases found in Chapter 3.

Chapters 4 and 5 respectively found that the influence of ECtHR jurisprudence had, what could be perceived as, a positive effect on the institutional relationship between the final appeal court and the executive as well as the relationship with the lower courts. The majority of cases (55%) that followed the ECtHR line upheld the executive. Furthermore, in human rights cases the lower court was overruled less (45% of appeals compared to 50-60% in other subject matters) and the final appeal court also appeared to approve of the lower court's reading of precedent in this area more than in other categories of case.

Table 16 in Chapter 4 demonstrated that in cases where the executive was involved, the ECtHR jurisprudence was clear in 27 appeals compared to only 5 appeals where the ECtHR line was unclear; 2 of which found in favour of the executive and 3 found against. The numbers are again too low to

draw any concrete conclusions, however the executive was less successful where the ECtHR line was unclear compared to when the court was able to follow the clear authority of the ECtHR.

Table 19, Following the Strasbourg Line and Overrule of Lower Court

		Whether the lower court was overruled			
		Yes	No	Reversed in part	Total
Does the case follow Strasbourg line of authority?	Yes	21	26	9	56
	No	1	2	0	3
	Justices unsure of what Strasbourg line is	5	6	3	14
Total		27	34	12	73

Table 19 reveals that the success of the lower court in human rights cases was not repeated across all cases that considered Convention jurisprudence. Although the lower court was still upheld more than it was overruled in full in these cases, if reversed in part statistics are included then the rate of overrule exceeded the rate of success. This may suggest that the success of the lower courts in human rights cases was more a result of the clarity of *domestic* jurisprudence in articulating whether there had been a breach of the individual's rights, rather than owing to the ability to draw upon Convention jurisprudence per se. Taking overrule and reversed in part together, the lower court was overruled on 57% of occasions where the ECtHR jurisprudence was unclear compared to 53.5% of occasions where the ECtHR jurisprudence was clear. Given the small numbers and lack of significant results, further study would be needed to confirm whether these results were true of a more general pattern. On the face it, the results suggest that the institutions reviewed had a greater ability to guide their conduct in accordance with the Convention, where the ECtHR jurisprudence was clear and constant. These results accord with the larger picture that the ECtHR line was less clear in the Supreme Court and there was also found to be a higher rate of overrule of both the executive and the lower courts in that court.

Precedent in the ECtHR context

The ECtHR does not adhere to a system of precedent and can depart from authority at will. Nevertheless, the s2 HRA requirement to consider ECtHR jurisprudence renders that jurisprudence central to the HRA and applicable under the system of *stare decisis* outlined in Chapter 5. Indeed, the overwhelming loyalty that has been shown to 'clear and constant' jurisprudence of the ECtHR

has led to suggestions that the UK courts have an offshore element and has prompted calls for a UK Bill of Rights.[39]

It is clear from the preceding section and Chapter 3 that the need to consider ECtHR authorities had administrative efficiency implications for the court. Human rights cases had a significantly longer hearing time which in turn translated into significantly lengthier judgments and significantly higher numbers of concurring opinions. These factors are presumably related to the number of ECtHR authorities that need to be considered alongside domestic precedent. Indeed, '… the amount of time counsel spend referring to and discussing Strasbourg case law' in Supreme Court human rights cases has been specifically referred to by Lady Hale extra judicially.[40]

The Supreme Court had a slightly higher average rate of ECtHR citations across all appeals, even though the number of human rights cases were less in that court (see Table 20). This difference was not, however, statistically significant[41] and is attributable to a slight increase in the average number of ECtHR citations in the 2009-2010 session (see table 21). These results indicate that although there were fewer cases and fewer *human rights* cases in the Supreme Court in the time period, the greater number of ECtHR citations overall suggests a wider- if not necessarily a deeper- review of the jurisprudence of the ECtHR in each appeal in the Supreme Court.

Table 20. Average Number of Strasbourg Citations by Court

	N	Mean	Std. Deviation
House of Lords	129	3.55	6.819
Supreme Court	117	3.82	8.177
Total	246	3.68	7.481

Table 21. Average Number of Strasbourg Citations by Session

	N	Mean	Std. Deviation
HL 2007-2008	79	3.42	6.881
HL 2008-2009	50	3.76	6.784
SC 2009-2010	57	4.25	9.351
SC 2010-2011	60	3.42	6.936

[39]See 'Tories plan to withdraw the UK from the European convention on human rights' published in The Guardian, 3rd October 2014 < www.theguardian.com/politics/2014/oct/03/tories-plan-uk-withdrawal-european-convention-on-human-rights> accessed 26th October 2015.
[40]Hale, 'Argentoratium Locotum', n15, p4
[41]$t(244) = 0.28$, $p = 0.78$

Total	246	3.68	7.481

The rate of ECtHR citations was at its highest in human rights cases (see table 22) and when the ECtHR jurisprudence was unclear (see Table 23). This latter difference, however, was not statistically significant.[42] These results accord with the results already seen in the 'overrule' section in relation to the increased hearing time, judgment length, judgment gap and number of concurring opinions where the Justices were unclear of the ECtHR line and demonstrate the need to consider the ECtHR authorities more broadly in order to rationalise the ECtHR's jurisprudence.

Table 22. Average Number of Strasbourg Citations by Subject Matter

Case_Type	Mean	N	Std. Deviation
HR	15.40	43	9.401
DCAPL	1.57	111	4.560
LOPL	.57	61	1.875
INT	1.10	31	3.208
Total	3.68	246	7.481

Table 23. Average Number of Strasbourg Citations by Following the Strasbourg Line

Does the case follow Strasbourg line of authority?	Mean	N	Std. Deviation
Yes	10.34	59	8.295
No	14.33	3	11.846
Justices unsure of what Strasbourg line is	16.57	14	11.960
Total	11.64	76	9.376

Table 24 demonstrates that the average number of ECtHR citations increased in a linear fashion as the panel size of the case increased and these differences were statistically significant.[43] The *post hoc* Bonferroni tests in Table 25 highlight statistically significant differences in citation rates between panels of 5 and 9 justices, as well as between panels of 7 and 9 justices. Again, this demonstrates the significant impact that the decision to convene a 9 justice panel made. That said, 6 out of the 13 cases that convened a 9 Justice panel involved a human rights matter, where there would have been

[42] $F(2,73)=2.75$, $p = 0.071$

[43] $F(3, 241) = 7.89$, $p < 0.0001$

a higher number of ECtHR citations. The results in Table 6, therefore, reflect the proportionately higher number of occasions that a human rights appeal called for a 9 justice panel to be convened. These 9 Justice panels were also accompanied by the significant adverse effects on the operational efficiency of the court found in chapter 3. The compromises on efficiency from a 9 Justice panel may, however, be offset by the greater instances of clarity in the ECtHR line when larger judicial panels were convened. Thus larger panels, with more judges conducting a wider review of the ECtHR authority, may have assisted in clarifying the ECtHR line in a Supreme Court that was found to be less clear of the ECtHR line than its predecessor.

Table 24. Average Number of Strasbourg Citations and Panel Size

	N	Mean	Std. Deviation	Std. Error
3 justices	2	.00	.000	.000
5 justices	208	3.00	6.297	.437
7 justices	22	5.36	9.565	2.039
9 justices	13	12.62	13.973	3.876
Total	245	3.69	7.493	.479

Table 25. Post hoc Bonferroni tests for Strasbourg Citations and Panel Size

		Mean			95% Confidence Interval	
(I) new_panel	(J) new_panel	Difference (I-J)	Std. Error	Sig.	Lower Bound	Upper Bound
3 justices	5 justices	-2.995	5.111	1.000	-16.59	10.60
	7 justices	-5.364	5.313	1.000	-19.50	8.77
	9 justices	-12.615	5.464	.131	-27.15	1.92
5 justices	3 justices	2.995	5.111	1.000	-10.60	16.59
	7 justices	-2.368	1.613	.860	-6.66	1.92
	9 justices	-9.620*	2.057	.000	-15.09	-4.15
7 justices	3 justices	5.364	5.313	1.000	-8.77	19.50
	5 justices	2.368	1.613	.860	-1.92	6.66
	9 justices	-7.252*	2.517	.026	-13.95	-.56
9 justices	3 justices	12.615	5.464	.131	-1.92	27.15
	5 justices	9.620*	2.057	.000	4.15	15.09
	7 justices	7.252*	2.517	.026	.56	13.95

*. The mean difference is significant at the 0.05 level.

From an institutional relations perspective, Table 26 confirms that there was more than double the number of ECtHR citations in cases where the executive was involved. This result was statistically

significant[44] and empirically reflects the large degree of overlap between cases that involved the executive and were influenced by the Convention. The results also lend further support to the idea of a three-way institutional relational dynamic in the time period. Table 27 nevertheless shows that there were only slightly more ECtHR citations, on average, in cases that upheld the executive and this difference was not statistically significant.[45] As such a wider review of ECtHR appeared to slightly benefit the executive; however, the difference was not substantial enough to draw any firm conclusions.

Table 26. Average Number of Strasbourg Citations and Executive Involvement

	N	Mean	Std. Deviation
No Executive involvement	163	2.40	5.825
Executive involvement	75	5.53	8.197
Total	238	3.39	6.804

Table 27. Average Number of Strasbourg Citations and Executive Success

	N	Mean	Std. Deviation
Not Applicable	163	2.40	5.825
Yes	37	5.11	8.051
No	38	5.95	8.424
Total	238	3.39	6.804

In terms of the institutional relationship with the 'lower courts', Table 28 confirms that ECtHR citations were higher when the lower court was upheld, although the highest number of citations was when the lower court was reversed in part. None of these differences were statistically significant.[46] Table 29 then tested whether overruling either a unanimous or a divided lower court made a difference to the volume of ECtHR citations. The results confirmed that decisions to *uphold* the lower court, whether unanimous or divided, had among the highest volume of ECtHR citations. This was not found to be statistically significant.[47] Again, these results suggest that a wider review of ECtHR authority was more likely to find in favour of the lower court reasoning, or at least part of it, however the data was not strong enough to provide any firm conclusions.

[44] $t(236) = 3.37$, $p = 0.001$
[45] $t(73) = -0.84$, $p = 1.00$
[46] $F(2,229) = 2.87$, $p = 0.059$
[47] $t(228) = 0.5$, $p = 0.48$

Table 28. Average Number of Strasbourg Citations and Overrule of Lower Court

	N	Mean	Std. Deviation
Yes	106	2.88	6.400
No	102	4.19	7.538
Reversed in part	24	6.88	11.723
Total	232	3.87	7.654

Table 29. Average Number of Strasbourg citations, Overrule of Lower Court and Unanimity of Lower Court

What the result was in the lower court	Overrule	Mean	N	Std. Deviation
Unanimous	Yes	3.93	108	8.231
	No	4.02	93	7.540
	Total	3.97	201	7.899
Divided	Yes	1.55	20	3.886
	No	5.89	9	7.753
	Total	2.90	29	5.621
Total	Yes	3.55	128	7.752
	No	4.19	102	7.538
	Total	3.83	230	7.648

Conclusion

The findings in this chapter substantiate and refine the preliminary conclusions reached in the preceding chapters on the institutional influence of the ECtHR in the time period.

In Chapter 5, the lower court was found to have been upheld more and to have applied precedent more successfully in the human rights field. These findings could be linked to the lower courts' ability to refer to the guidance provided by the ECtHR jurisprudence or could have been attributable to the clarity of domestic precedent in the human rights field. This chapter, however, reveals that the lower court's success was not repeated where Convention jurisprudence was considered in non-human rights cases. This suggests that the relative success of the lower courts recorded in the human rights field, was more attributable to the clarity of the reasoning in *domestic* human rights precedents, rather than the ability to draw upon the ECtHR jurisprudence. The ECtHR's broad approach to Convention issues ensures that the final appeal court is required to substantiate and reason through

the jurisprudence in the domestic context and in the time period this appears to have strengthened the clarity of domestic precedent and institutional communication. This may also explain why the executive was able to administer itself in accordance with the requirements of the Convention in the majority of cases.

It was also clear that the executive and lower courts were more successful in cases where the ECtHR line was clear and constant. The academic and judicial voices that call for a more critical view of ECtHR jurisprudence and a more proactive role in the establishment of a domestic jurisprudence of human rights no doubt have merit. However, this study suggests that, at least in the short-term, such an approach would weaken the predictability that is created by directly mirroring the clear and constant jurisprudence of the ECtHR and could create the impression of a more assertive court that overrules the lower court and executive more often. Thus, an approach which deviates from the Convention would make it more difficult for the domestic institutions that are engaged with the final appeal court to conduct themselves in accordance with the domestic requirements of the Convention, until such a time as the domestic jurisprudence was properly established.

Furthermore, applying the clear and constant ECtHR line had less of a negative effect on the administrative efficiency of the court compared to when the ECtHR line was unclear and the judges were required to undertake a more constructive role. The higher number of concurring opinions, the longer judgments, the longer hearing length, the greater instance of dissent all appeared to be more associated with a lack of clarity in the ECtHR line of authority. Thus the preliminary conclusions which advocated more concurring opinions, longer judgements and wider citation of authority to assist in developing the reasoning of judgments and the subsequent ability of institutions to interpret the judgment requires some refinement. This chapter has shown that these factors were not always a *reason* for clarity but sometimes a *symptom* of a lack of clarity in the ECtHR jurisprudence. Instead, where the ECtHR line was clear, the instances of concurrence and dissent were less elevated, the judgment length was in line with the average for the time period, the increased hearing time was less pronounced and the judgment gap was shorter than when the ECtHR line was unclear. Thus, although it is still true that a *slightly* higher number of concurring opinions in the human rights field and a wider citation of authority appeared to assist the lower court, the lower court's ability to read precedent clearly in the human rights context appeared to be primarily owing to the clearer articulation by the judges of what the requirements of the Convention were in human rights cases, based upon clear ECtHR guidance.

It was clear from the time period that in order for the court's institutional relationship with the ECtHR to support the court's domestic institutional relationships and not adversely affect the

administrative efficiency of the court, the instances where ECtHR jurisprudence is unclear need to be minimised. Although this is the institutional responsibility of the ECtHR, there are ways that the Supreme Court could assist. For instance, there was tentative evidence to suggest that the Supreme Court was better able to reason through the ECtHR authorities with more judges on the case. Thus a greater instance of 7 Justice panels where the ECtHR line is unclear, would (as seen in chapter 3) not be as administratively burdensome on the court as convening a 9 justice panel and may prove an extremely constructive way of enhancing the dialogue between the Supreme Court, the ECtHR and clarifying the communication channels for each of the court's domestic institutional relationships going forward.

In contrast to the relationship with the ECtHR, the succinct nature of institutional communication between the final appeal court and the CJEU characterised that institutional relationship. The final appeal court took its lead from the CJEU, referring matters to it in short, unanimous and mostly single judgments. Nevertheless, this study also revealed that when a reference was considered and declined, the effect on judgment style was to enhance the common law characteristics of the final appeal court judgment. The statistically significant increase in length of hearing, the longer length of judgment, the significant increase in the number of concurring opinions, the higher level of dissent and the slightly higher number of CJEU citations means that these cases bore all the traditional hallmarks of common law judgments and the associated impact on the administrative efficiency of the court as outlined in Chapter 3. In sum, the reference procedure itself is designed to promote clear, succinct, institutional communication between the CJEU and the final appeal court, so that the latter can duly implement the former court's interpretation of the EU Treaties. However, the domestic impact on institutional relations in cases that declined to make a reference - be it because the matter was *acte clair* or it was not *necessary* to determine the appeal before the court- was more reasoned individual opinions.[48]

Anderson advocated a repeal of the reference procedure, owing to the adverse effect on the efficiency of the Appellate Committee when a reference was made and because reference cases rarely, 'invest the time and effort necessary to arrive at and express … a conclusion in circumstances where that conclusion will not be determinative and risks being contradicted by the ECJ.'[49] He therefore felt that the obligation to refer would prevent the Supreme Court from realising its full

[48]There were certainly more academic citations in cases that declined to make a reference (5.35 mean) compared to those that made a reference (0.91 mean) or where a reference was not applicable (4.17 mean).
[49]D Anderson, 'The Law Lords and the European Courts' in A Le Sueur (eds), *Building the UK's New Supreme Court, National and Comparative Perspectives* (OUP, 2004)

potential to contribute to the development of EU Law.[50] The reference procedure did delay judgments significantly and affected the ability of the court to deliver a judgment in a reasonable time. Only two cases responded to a CJEU reference in the time period and so no clear conclusions can be reached on how those cases impacted upon domestic institutional relations. Given the conclusions reached in relation to the ECtHR, it may be no small coincidence that the lack of a sustained domestic jurisprudence in the EU context is potentially damaging to domestic institutional communication in that context. A wider study confirming this trend may therefore support Anderson's repeal of the reference procedure. However, the empirical data also revealed that a by-product of the reference procedure- and perhaps the wish to avoid the delay associated with making a reference- was for the judges to actively participate in decisions that declined to make a reference by contributing their own analysis of whether a matter was *acte clair*. In this sense, the reference procedure may inadvertently result in a more sustained domestic review of EU authorities and allow the domestic court to contribute more to the development of EU law.

In summary, the institutional relationships with the European courts each had a- often statistically significant- bearing on the administrative efficiency, the judgment style and ultimately the domestic institutional relationships of the final appeal court. Any future adjustments- be they constitutional or informal- to the court's institutional relationship with the European courts is likely to have a significant impact on the operation of the Supreme Court going forward.

[50] Anderson, 'The Law Lords and the European Courts',n49, p216

Chapter 7; Conclusion

At the conception of this project, the research objective was to measure whether the transition from Appellate Committee to Supreme Court resulted in any statistically significant changes in the administrative efficiency and the institutional relationships of the final appeal court. Both significant and non-significant changes have been uncovered in this study and some recommendations have been made to improve the administrative efficiency and institutional relations of the Supreme Court. Broadly, these include convening 7 justice panels wherever possible in place of 9 justice panels to lessen the impact on the efficiency of the court, opting for a judgment style that includes one or two concurring opinions to strengthen the reasoning in the judgment and guidance provided to other institutions and including an agreed statement of facts and legal issues, to reduce judgment length and provide more synchronisation between concurring opinions.

The Supreme Court appeared to be marginally more assertive than the Appellate Committee, with the executive being less successful and the lower courts, including the Scottish courts, being more frequently overruled in 2009-2011. This could indicate the beginning of a more forceful court following its institutional separation and greater level of independence. Indeed, any rise in power of the court could be legitimised through it having more visibility and more democratic accountability following the implementation of the CRA.[1] Nevertheless, what was evident in every chapter of the thesis was the significant effect that the institutional influence of the ECtHR appeared to have on both domestic institutional relationships and the administrative efficiency of the court. Indeed the executive was more successful and the lower courts were upheld more in the human rights cases and it may be more than coincidental that these institutions were less successful in the Supreme Court, where fewer human rights cases arose in the time period. If this analysis is correct, then the constitutional change that could have as great an effect as the CRA on the administrative efficiency and institutional relations of the Supreme Court is the repeal of the HRA and the introduction of a domestically-focussed British Bill of Rights.

The extent to which a repeal of the HRA would impact upon the final appeal court would very much depend on the exact legal arrangements. For instance, if the UK remained a signatory to the Convention, the court would still have to consider the ECtHR jurisprudence in ensuring that the UK complied with its international obligations and thus it may be that no discernible difference in judicial practice would occur. The study also revealed that the subtle effects of the Convention on

judicial-executive relations go beyond the Convention context and could not necessarily be altered by the repeal of the HRA. This included the willingness to review independent executive action to ensure proper institutional decision-making processes when the rights of an individual were adversely affected, the power of judicial review under the rule of law, the willingness to isolate the legal from the political and find matters more justiciable and the impact of proportionality-based review in characterising the relationship between the executive and judiciary. These more subtle changes in judicial attitude and the characterisations of the judicial-executive relationship cannot be reversed simply by repealing the HRA.

A Bill of Rights would require a domestic body of jurisprudence to be built under that instrument, which would in no doubt be influenced by the position that courts had already established on rights under the Convention. In the event of a repeal of the HRA, Malleson has stated that 'it is hard to imagine that the Supreme Court Justices would simply put aside the case law and the human rights legal culture which the courts have developed over the last decade' and instead suggests that there would be a 'considerable degree of constitutional fudging so as to retain the principles and decision-making processes, if not the form, of the HRA.'[2] Clearly, the lower courts and to some extent the executive, were able to use the ECtHR jurisprudence and domestic jurisprudence under the HRA to successfully guide their conduct in the Convention context and there would be benefits to institutional relations if the new domestic jurisprudence did not deviate markedly from the existing body of jurisprudence under the HRA.

From an administrative efficiency perspective, the removal of the need to consider the ECtHR jurisprudence may assist in improving the efficiency of the court. Chapters 3 and 6 demonstrated the significant adverse effects on the efficiency of the court where the ECtHR line of authority was unclear and there was a need to rationalise the different strands of ECtHR jurisprudence. By removing the need for the Supreme Court to act as a hub between the ECtHR and the lower courts it may improve the efficiency of the court. Nevertheless, the rationalisation of ECtHR jurisprudence into domestic law- at least where ECtHR jurisprudence was clear- appeared to have a positive effect on the clarity of domestic precedent. Thus the removal of the need to consider ECtHR jurisprudence may adversely affect the clarity of domestic precedent in the rights context.

A two year time period is too short to make any firm conclusions as the court needs time to adjust to its institutional separation and to evolve with its developing caseload. Furthermore, Shah and Poole have acknowledged, 'statistical analyses, revealing though they can be, often work best as platforms

[1]R Hazell, 'Judicial Independence and Accountability in the UK have both emerged stronger as a result of the CRA 2005' [2015] PL 198

from which other studies can build.'[3] This study revealed several areas where a larger time period was required as the statistics were affected by fluctuations in caseload or too low numbers were returned in the time period to conduct further analysis.[4] There were also areas where significant differences were found and there was a need for deeper qualitative analysis to discover the reason for those results.[5]

The study further revealed how the focus on institutions was occasionally too blunt and failed to take into account the fact that institutions are characterised by the individuals within those institutions. This was particularly apparent when the observational data in the Parliament section appeared to suggest that certain judges were more predisposed to adopting purposive interpretative techniques, with others favouring a more literal approach to statutory language. These judicial predispositions were then reflected in the Convention context in terms of how those judges navigated the infrastructure in the HRA. Individual judicial styles therefore clearly influenced judicial-parliamentary relations in the time period. The differences between Lord Bingham's and Lord Phillip's style of presiding over the court may also have been responsible for certain administrative efficiency changes identified, such as the longer time taken to produce judgments in the Supreme Court. In this sense, it is acknowledged that the retirement and appointment of certain judges can also have an impact on both the administrative efficiency and the institutional relationships of the court. A wider time period and a more tailored study could perhaps account for the effect of individuals on the court.

This study has provided a systematic, empirically-informed snapshot of the evolving power of the Supreme Court, its efficiency, its style and the interconnection between the institutions which either have a relationship with or influence the court. It is very early days in the court's life and the constitutional framework that gives the court its structure is also changing. This is part of the fluidity of the UK constitution. Nevertheless, the relative power of the court and the significant effects of the institutional influence of the ECtHR found here form firm foundations on which to build further studies.

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[2] K Malleson, 'The evolving role of the Supreme Court' [2011] PL 754, 763-764

[3] Shah and Poole, 'The impact of the Human Rights Act on the House of Lords' [2009] PL 347, 369

[4] See CJEU reference cases and Northern Irish appeals.

[5] See e.g. the interrelationship between different categories of citation, the individual judicial preference for either a literal or a purposive approach to statutory interpretation or the reasons why overrule was higher where the lower court followed precedent.

Annex 1: Dataset

Appellate Committee of the House of Lords Session 2007-2008

Case No.	Party Names.	Citation.
1.	Secretary of State for the Home Department (Appellant) v AH (Sudan) and others (FC) (Respondents)	[2007] UKHL 49
2.	Ward (AP) (Appellant) v Police Service of Northern Ireland (Respondents) (Northern Ireland)	[2007] UKHL 50
3.	Watt (formerly Carter) (sued on his behalf of the other members of the Labour Party) (Respondent) v Ahsan (Appellant)	[2007] UKHL 51
4.	R (on the application of Countryside Alliance and others and others (Appellants) v Her Majesty's Attorney General and another (Respondents)	[2007] UKHL 52
5.	Whaley and another (Appellant) v Lord Advocate (Respondent) (Scotland)	[2007] UKHL 53
6.	Kola (FC) and another (FC) (Appellants) v Secretary of State for Work and Pensions (Respondent)	[2007] UKHL 54
7.	In re M (FC) and another (FC) (Children) (FC)	[2007] UKHL 55
8.	Clarke (Appellant) v Fennoscandia Limited and others (Respondents) (Scotland)	[2007] UKHL 56
9.	Saber (AP) (Appellant) v Secretary of State for the Home Department (Respondent)	[2007] UKHL 57
10.	R (on the application of AL-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)	[2007] UKHL 58
11.	Phillips and another (suing as administrators of the estate of Christo Michailidis) (Appellants) v Symes and others (Respondents) and others	[2008] UKHL 1
12.	Fleming (t/a Bodycraft) and Conde Nast Publications Limited (Respondents) v Her Majesty's Revenue and Customs (Appellants)	[2008] UKHL 2
13.	In re Hilali (Respondent) (application for a writ of Habeas Corpus)	[2008] UKHL 3
14.	In re Duffy (FC) (Appellant) (Northern Ireland)	[2008] UKHL 4
15.	Boss Holdings Limited (Appellants) v Grosvenor West End Properties and others (Respondents)	[2008] UKHL 5
16.	A v Hoare	[2008] UKHL 6
17.	Pilecki (Appellant) v Circuit Court of Legnica, Poland	[2008] UKHL 7
18.	R v Clarke (Appellant); R v McDaid (Appellant)	[2008] UKHL 8
19.	In re Maye (AP) (Appellant) (Northern Ireland)	[2008] UKHL 9
20.	Majorstake Limited (Respondents) v Curtis (Appellant)	[2008] UKHL 10
21.	Scottish & Newcastle International Limited (Respondents) v Othon Ghalanos Limited (Appellants)	[2008] UKHL 11

22.	Reinwood Limited (Respondents) v L Brown & Sons Limited (Appellants)	[2008] UKHL 12
23.	Corr (administratix of estate of Thomas Corr (deceased) (Respondent) v IBC Vehicles Limited (Appellants)	[2008] UKHL 13
24.	R (on application of M) (FC) (Appellant) v London Borough of Hammersmith and Fulham (Respondents)	[2008] UKHL 14
25.	R (on the application of Animal Defenders International) (Appellants) v Secretary of State for Culture, Media and Sport (Respondent)	[2008] UKHL 15
26.	Norris (Appellant) v Government of the United States of America and others (Respondent) (Criminal Appeal from Her Majesty's High Court of Justice)	[2008] UKHL 16
27.	R v GG plc and others (Appellants)	[2008] UKHL 17
28.	Brit Syndicates Limited for and on behalf of Brit Syndicate 2987 at Lloyds for the 2003 a/c and others (Respondents) v Italaudit SpA (in liquidation) (Appellants)	[2008] UKHL 18
29.	Total Network SL (a company incorporated in Spain) (Original Respondents and Cross-appellants) v HMRC (suing as Commissioners of Customs and Excise) (Original Appellants and Cross-respondents)	[2008] UKHL 19
30.	R (on the application of Gentle) (FC) and another (FC) (Appellants) v The Prime Minister and others (Respondents)	[2008] UKHL 20
31.	McGrath and another (Appellants) and others v Riddell and others (Respondents)	[2008] UKHL 21
32.	R (on the application of Edwards) and another (Appellant) v Environment Agency and others (Respondents)	[2008] UKHL 22
33.	Principal and Fellows of Newnham College in the University of Cambridge (Respondents) v Her Majesty's Revenue and Customs (Appellants)	[2008] UKHL 23
34.	Simmers (Respondent) v Innes (Appellant) (Scotland)	[2008] UKHL 24
35.	Ashley (FC) and another (FC) (Respondents) v Chief Constable of Sussex Police (Appellant)	[2008] UKHL 25
36.	R(on the application of M) (FC) (Appellant) v Her Majesty's Treasury (Respondents) and two other actions	[2008] UKHL 26
37.	R (on the application of Bapio Action Limited and another) (Respondents) v Secretary of State for the Home Department and another (Appellant)	[2008] UKHL 27
38.	R v May (Appellant) (On appeal from the Court of Appeal (Criminal Division)	[2008] UKHL 28
39.	Crown Prosecution Service (Respondent) v Jennings (Appellant)	[2008] UKHL 29

40.	R v Green (Appellant) (On Appeal from the Court of Appeal (Criminal Division)	[2008] UKHL 30
41.	R v Asfaw (Appellant) (On Appeal from the Court of Appeal (Criminal Division)	[2008] UKHL 31
42.	Bowden (AP) (Appellant) v Poor Sisters of Nazareth (Respondents) and others (Scotland) Whitton (AP) (Appellant) v Poor Sisters of Nazareth (Respondents) and others	[2008] UKHL 32
43.	In re CD (Original Respondent and Cross-appellant) (Northern Ireland)	[2008] UKHL 33
44.	OB (by his mother and litigation friend) (FC) (Respondent) v Aventis Pasteur SA (Appellants)	[2008] UKHL 34
45.	In re B (Children) (FC)	[2008] UKHL 35
46.	R v Davis (Appellant) (On appeal from the Court of Appeal (Criminal Division))	[2008] UKHL 36
47.	R v G (Appellant) (On appeal from the Court of Appeal (Criminal Division))	[2008] UKHL 37
48.	In re P and others (AP) (Appellants) (Northern Ireland)	[2008] UKHL 38
49.	Beoku-Betts (FC) (Appellant) v Secretary of State for the Home Department	[2008] UKHL 39
50.	Chikwamba (FC) (Appellant) v Secretary of State for the Home Department	[2008] UKHL 40
51.	E B Kosovo (FC) (Appellant) v Secretary of State for the Home Department	[2008] UKHL 41
52.	AL (Serbia) (FC) (Appellant) and R(on the application of Rudi) (FC) (Appellant) v Secretary of State for the Home Department	[2008] UKHL 42
53.	Mayor and Burgesses of the London Borough of Lewisham (Appellants) v Malcolm (Respondent)	[2008] UKHL 43
54.	Earl Cadogan and others Howard de Walden Estates Limited (Respondents) v 26 Cadogan Square Limited and Aggio and others (Appellants)	[2008] UKHL 44
55.	R v Rahman and others (Appellants) (On Appeal from the Court of Appeal (Criminal Division))	[2008] UKHL 45
56.	Spencer-Franks (Appellant) v Kellogg Brown and Root Limited and others (Respondents) (Scotland)	[2008] UKHL 46
57.	Common Services Agency (Appellants) v Scottish Information Commissioner (Respondent) (Scotland)	[2008] UKHL 47
58.	Transfield Shipping Inc (Appellants) v Mercator Shipping Inc	[2008] UKHL 48

	(Respondents)	
59.	Conor Medsystems Incorporated (Respondents) v Angiotech Pharmaceuticals Incorporated and others (Appellants)	[2008] UKHL 49
60.	Chief Constable Hertfordshire Police (Original Appellant and Cross-respondent) v Van Colle (Original Appellants and Cross-respondents) and Smith (Respondent) v Chief Constable of Sussex police (Appellant)	[2008] UKHL 50
61.	Caldarelli (Appellant) v Court of Naples (Respondents) (Criminal Appeal from Her Majesty's High Court of Justice)	[2008] UKHL 51
62.	R (on the application of M) (FC) (Respondent) v Slough Borough Council (Appellants)	[2008] UKHL 52
63.	R (on the application of Baiai and others R (on the application of Trzcinska and others) (Respondents) v S of S for Home Dept (Appellant)	[2008] UKHL 53
64.	Maco Door and Window Hardware (UK) Limited (Respondents) v Her Majesty's Revenue and Customs (Appellants)	[2008] UKHL 54
65.	Yeoman's Row Management Limited (Appellants) and another v Cobbe (Respondent)	[2008] UKHL 55
66.	Gallagher (Valuation Officer) (Respondent) v Church of Jesus Christ of Latter-day Saints (Appellants)	[2008] UKHL 56
67.	Doherty (FC) (Appellant) v Birmingham City Council (Respondents)	[2008] UKHL 57
68.	R (on the application of Heffernan) (FC) (Appellant) v The Rent Service (Respondents)	[2008] UKHL 58
69.	McKinnon (Appellant) v Government of the United States of America (Respondents) and another	[2008] UKHL 59
70.	R (on the application of Corner House Research and others) (Respondents) v Director of the Serious Fraud Office (Appellant) (Criminal Appeal from HM High Court of Justice)	[2008] UKHL 60
71.	R (on the application of Bancoult) (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant)	[2008] UKHL 61
72.	Helow (AP) (Appellant) v Secretary of State for the Home Department and another (Respondents)(Scotland)	[2008] UKHL 62
73.	R (on the application of RJM)(FC) (Appellant) v Secretary of State for Work and Pensions (Respondent)	[2008] UKHL 63
74.	EM (Lebanon)(FC) (Appellant) v Secretary of State for the Home Department (Respondent)	[2008] UKHL 64

75.	Scottish and Newcastle plc (Original Respondents and Cross-appellants) v Raguz (Original Appellant and Cross-respondent)	[2008] UKHL 65
76.	In re E (a child)(AP) (Appellant) (Northern Ireland)	[2008] UKHL 66
77.	Zalewska (AP)(Appellant) v Department for Social Development (Respondents) (Northern Ireland)	[2008] UKHL 67
78.	R (on the application of JL) (Respondent) v Secretary of State for Justice (Appellant)	[2008] UKHL 68
79.	Kay (FC) (Appellant) v Commissioner of the Police of the Metropolis (Respondent)	[2008] UKHL 69

Appellate Committee of the House of Lords Session 2008-2009

Case No.	**Party Names.**	**Citation.**
80.	Knowsley Housing Trust v White (FC); Honeygan-Green v London Borough of Islington; Porter (FC) v Shepherds Bush Housing Association	[2008] UKHL 70
81.	Earl Cadogan (Appellant) v Pitts and another (Respondents); Earl Cadogan and others (Appellant) v Sportelli	[2008] UKHL 71
82.	R (on the application of Wellington)(FC) (Appellant) v Secretary of State for the Home Department (Respondent)	[2008] UKHL 72
83.	R v Chargot Limited (t/a Contract Services) and others (Appellants)	[2008] UKHL 73
84.	Savage (Respondent) v South Essex Partnership NHS Foundation Trust (Appellants)	[2008] UKHL 74
85.	R (on the application of Black) (Respondent) v Secretary of State for Justice (Appellant)	[2009] UKHL 1
86.	Mucelli (Appellant) v Government of Albania (Respondents); Moulai (Respondent) v DPP in Creteil France (Appellant)	[2009] UKHL 2
87.	R (on the application of Wright and others)(Appellants) v Secretary of State for Health and another (Respondents)	[2009] UKHL 3
88.	Trent Strategic Health Authority (Respondents) v Jain and another (Appellants)	[2009] UKHL 4
89.	Austin (FC) (Appellant) & another v Commissioner of Police of the Metropolis (Respondent)	[2009] UKHL 5

90.	ZT (Kosovo)(Respondent) v Secretary of State for the Home Department (Appellant)	[2009] UKHL 6
91.	Holmes-Moorhouse (FC) (Original Respondent and Cross-appellant) v London Borough of Richmond upon Thames (Original Appellants and Cross-respondents)	[2009] UKHL 7
92.	Marks and Spencer plc (Appellants) v Her Majesty's Commissioners of Customs and Excise (Respondent)	[2009] UKHL 8
93.	Sugar (Appellant) v British Broadcasting Corporation and another (Respondents)	[2009] UKHL 9
94.	RB (Algeria) and another (Appellants) v Secretary of State for the Home Department (Respondents); OO (Jordan) (Original Respondents and Cross-Appellants) v Secretary of State for the Home Department (Original Appellants and Cross-respondents)	[2009] UKHL 10
95.	Mitchell (AP) and another (Original Respondents and Cross-appellants) v Glasgow City Council (Original Appellants and Cross-respondents) (Scotland)	[2009] UKHL 11
96.	Generics (UK) Limited and others (Appellants) v H Lundbeck A/S (Respondents)	[2009] UKHL 12
97.	R v G (Respondent); R v J (Respondent) (on appeal from the CA Criminal Division)	[2009] UKHL 13
98.	R (on the application of Ahmed) (Respondent) v Mayor and the Burgesses of London Borough of Newham (Appellants)	[2009] UKHL 14
99.	In re McE; In re M; In reC (Appellants) (Northern Ireland)	[2009] UKHL 15
100.	Ofulue and another (FC) (Appellant) v Bossert (FC) (Respondent)	[2009] UKHL 16
101.	King (Respondent) v Director of the Serious Fraud Office (Appellant) (On appeal from the Court of Appeal Criminal Division)	[2009] UKHL 17
102.	Thorner (Appellant) v Majors and others (Respondents)	[2009] UKHL 18
103.	R v Briggs-Price (Appellant) (On Appeal from the Court of Appeal (Criminal Division))	[2009] UKHL 19
104.	R v JTB (Appellant) (on appeal from the Court of Appeal Criminal Division)	[2009] UKHL 20
105.	Gomes (Appellant) Goodyer (Appellant) v Government of Trinidad and Tobago (Respondents)	[2009] UKHL 21
106.	Secretary of State for Justice (Respondents) v James (FC) (Appellant); R(on the application of Lee) (FC) (Appellant) v Secretary of State for Justice (Respondents)	[2009] UKHL 22

107.	Secretary of State for the Home Department (Respondent) v Nasseri (FC) (Appellant)	[2009] UKHL 23
108.	McConkey and another (Appellants) v The Simon Community (Respondents) (Northern Ireland)	[2009] UKHL 24
109.	Odelola (FC) V Secretary of State for the Home Department (Respondent)	[2009] UKHL 25
110.	R (on the application of G)(FC) (Appellant) v London Borough of Southwark (Respondents)	[2009] UKHL 26
111.	Smith (Appellant) v Northamptonshire County Council (Respondents)	[2009] UKHL 27
112.	Secretary of State for the Home Department (Respondent) v AF (Appellant)(FC) and another	[2009]UKHL 28
113.	Hanoman (FC) (Respondent) v London Borough of Southwark (Appellants)	[2009] UKHL 29
114.	R v Islam (Respondent) (on appeal from the Court of Appeal Criminal Division)	[2009] UKHL 30
115.	Her Majesty's Revenue and Customs (Respondents) v Stringer and others (Appellants)	[2009] UKHL 31
116.	AS (Somalia) (FC) and another (Appellants) v Secretary of State for the Home Department (Respondent)	[2009] UKHL 32
117.	Gray (Original Respondent and Cross-appellants) v Thames Trains and others (Original Appellant and Cross -respondents)	[2009] UKHL 33
118.	Attorney General Reference No 3 of 1999: Application by the BBC to set aside or vary a Reporting Restriction Order	[2009] UKHL 34
119.	TRM Copy Centres (UK) Limited and others (Respondents) v Lanwall Services Limited (Appellants)	[2009] UKHL 35
120.	Birmingham City Council (Appellants) v Ali (FC) and others (FC) (Respondents); Moran (FC) (Appellant) v Manchester City Council (Respondents)	[2009] UKHL 36
121.	SCA Packaging Limited (Appellants) v Boyle (Respondent) (Northern Ireland)	[2009] UKHL 37
122.	Chartbrook Limited (Respondents) v Persimmon Homes Limited and others (Appellants)	[2009] UKHL 38
123.	Moore Stephens (a firm) (Respondents) v Stone Rolls Limited (in liquidation) (Appellants)	[2009] UKHL 39

124.	Lexington Insurance Co (Respondents) v AGF insurance Limited (Appellants) and Wasa International Insurance Company Limited (Appellants)	[2009] UKHL 40
125.	Fisher (Original Respondent and Cross-appellant) v Brooker and others (Original Appellants and Cross-respondents)	[2009] UKHL 41
126.	R v C (Respondent) (On appeal from the Court of Appeal (Criminal Division))	[2009] UKHL 42
127.	Masri (Respondent) v Consolidated Contractors International Company SAL and others and another (Appellant)	[2009] UKHL 43
128.	Transport for London (London Underground Limited) (Appellants) v Spirerose Limited (in administration) (Respondents)	[2009] UKHL 44
129.	R(on the application of Purdy) (Appellant) v Director of Public Prosecutions (Respondent)	[2009] UKHL 45

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130.	R (on the application of E) (Respondent) v Governing Body of JFS and Admissions Appeal Panel of JFS and others	[2009] UKSC 1
131.	In Re Sigma Finance Corporation (in administrative receivership) and In Re The Insolvency Act 1986 (Conjoined appeals)	[2009] UKSC 2
132.	R (on the application of L) (FC)(Appellant) v Commissioner of Police of the Metropolis	[2009] UKSC 3
133.	Louca (Appellant) v A German Judicial Authority (Respondents) (Criminal Appeal from HM Ct of Justice)	[2009] UKSC 4
134.	In re B (A child) (2009) (FC)	[2009] UKSC 5
135.	Office of Fair Trading (Respondents) v Abbey National plc & others (Appellants)	[2009] UKSC 6
136.	BA (Nigeria)(FC) (Respondent); PE (Cameroon) (FC) (Respondent) v Secretary of State for the Home Department (Appellants) (Con Appeals)	[2009] UKSC 7
137.	R (on the application of A)(FC) (Appellant) v London Borough of Croydon (Respondents); R (on the application of M)(FC) (Appellant) v London Borough of Lambeth (Respondents)	[2009] UKSC 8
138.	R (on the application of Barclay and others)(Appellants) v Secretary of State for Justice and others (Respondents)	[2009] UKSC 9

139.	I (A Child)	[2009] UKSC 10
140.	Secretary of State for Environment, Food and Rural Affairs (Respondent) v Meier and another (FC)(Appellant)	[2009] UKHL 11
141.	R (on the application of A) (Appellant) v B (Respondent)	[2009] UKSC 12
142.	Barratt Homes Limited (Respondents) v Dwr Cymru Cyfngeig (Welsh Water) (Appellants)	[2009] UKSC 13
143.	R v Horncastle and others (Appellants)	[2009] UKSC 14
144.	R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appellants)	[2009] UKSC 15
145.	Ahmed Mahad, Sahro Ali, Malyun Ismail, Vettivetpillai Sakthivel, Abdi-Malik Muhumed v Entry Clearance Officer	[2009] UKSC 16
146.	S-B (Children)	[2009] UKSC 17
147.	Guardian News and Media Ltd in HM Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants)	[2010] UKSC 1
148.	Her Majesty's Treasury (Respondent) v Mohammed Jaber Ahmed and others (FC) (Appellants)	[2010] UKSC 2
149.	Office of Communications (Respondent) v The Information Commissioner (Appellant)	[2010] UKSC 3
150.	Grays Timber Products Limited (Appellants) v HM Rev and Customs (Respondents) (Scotland)	[2010] UKSC 4
151.	Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants)	[2010] UKSC 5
152.	Allison (Appellant) v Her Majesty's Advocate (Respondent) (Scotland)	[2010] UKSC 6
153.	McInnes (Appellant) v Her Majesty's Advocate (Respondent) (Scotland)	[2010] UKSC 7
154.	Tomlinson and others (FC) (Appellants) v Birmingham City Council (Respondents)	[2010] UKSC 8
155.	Norris (Appellant) v Government of United States of America (Respondent)	[2010] UKSC 9
156.	Martin and Miller (Appellants) v Her Majesty's Advocate	[2010] UKSC 10
157.	R (on the application of Lewis) (Appellant) v Redcar and Cleveland Borough Council and another (Respondents)	[2010] UKSC 11

158.	Re W (Children)	[2010] UKSC 12
159.	Agbaje (Respondent) v Akinnoe-Agbaje (FC) (Appellant)	[2010] UKSC 13
160.	RTS Flexible Systems Limited (Respondents) v Molkerei Gmbh & Company KG (UK Production) (Appellants)	[2010] UKSC 14
161.	R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant)	[2010] UKSC 15
162.	British Airways plc (Respondent) v Ms Sally Williams and others (Appellants)	[2010] UKSC 16
163.	R (on the application of F (by his litigation friend F) and Thompson (FC) (Respondents) v S of S Home Dept (Appellants)	[2010] UKSC 17
164.	Farstad Supply (AS) (Appellant) v Enviroco Limited and another (Respondents) (Scotland)	[2010] UKSC 18
165.	Inveresk plc (Respondent) v Tullis Russell Papermakers Limited (Appellant) (Scotland)	[2010] UKSC 19
166.	R (on the application of Sainsbury's Supermarkets Ltd)(Appellant) v Wolverhampton City Council and another (Respondents)	[2010] UKSC 20
167.	ZN (Afghanistan) (FC) and others (Appellants) v Entry Clearance Officer (Karachi) (Respondent)	[2010] UKSC 21
168.	Roberts (FC) (Appellant) v Gill & Co Solicitors and others (Respondents)	[2010] UKSC 22
169.	OB (by his mother and litigant friend) (FC) (Respondent) v Aventis Pasteur SA (Appellants)	[2010] UKSC 23
170.	Secretary of the State for the Home Department (Respondent) v AP (Appellant)	[2010] UKSC 24
171.	MS (Palestinian Territories) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)	[2010] UKSC 25
172.	Secretary of State for the Home Department (Respondent) v AP (Appellant) (No 2)	[2010] UKSC 26
173.	In the matter of an application by JR17 for Judicial Review (Northern Ireland)	[2010] UKSC 27
174.	Austin (FC) (Appellant) v Mayor and Burgesses of London Borough of Southwark (Respondent)	[2010] UKSC 28
175.	R (on the application of Smith) (Respondent) v Secretary of State for Defence and another (Appellants)	[2010] UKSC 29

176.	R (on the application of Noone) (FC) (Appellant) v The Governor of HMP Drake Hall and another (Respondents)	[2010] UKSC 30
177.	HJ (Iran)(FC) and HT (Cameroon) (FC) (Appellant) v Secretary of State for the Home Department	[2010] UKSC 31
178.	Southern Pacific Securities 05-2 Plc (Respondent) v Walker and another (Appellants)	[2010] UKSC 32
179.	A (Appellant) v Essex County Council (Respondent)	[2010] UKSC 33
180.	O'Brien (Appellant) v Ministry of Justice (Respondents)	[2010] UKSC 34
181.	Star Energy Weald Basin Limited and another (Respondents) v Bocardo SA (Appellant)	[2010] UKSC 35
182.	R (on the application of ZO (Somalia) and others) (Respondents) v Secretary of State for the Home Dept (Appellant)	[2010] UKSC 36
183.	Morrision Sports Limited and others (Respondents) v Scottish Power (Appellant) (Scotland)	[2010] UKSC 37
184.	RTS Flexible Systems Limited (Respondents) v Molkerei Alois Muller GmBH & Co (Appellants)	[2010] UKSC 38
185.	R v Rollins (Appellant)	[2010] UKSC 39
186.	R (on the application of the Electoral Commission) (Respondents) v City of Westminster Magistrates Court (Respondents) and the UKIP (Appellant)	[2010] UKSC 40

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187.	Gisda Cyf (Appellent) v Barratt (Respondent)	[2010] UKSC 41
188.	Radmacher (formerly Granatino) (Respondent) v Granatino (Appellant)	[2010] UKSC 42
189.	Cadder (Appellant) v Her Majesty's Advocate (Respondent) (Scotland)	[2010] UKSC 43
190.	Oceanbulk Shipping & Trading SA (Respondent) v TMT Asia Limited and others (Appellants)	[2010] UKSC 44
191.	Manchester City Council (Respondent) v Pinnock (Appellant)	[2010] UKSC 45
192.	Dallah Real Estate and Tourism Holding Company (Appellant) v The Ministry of Religious Affairs, Government of Pakistan (Respondent)	[2010] UKSC 46
193.	Multi-Link Leisure Developments Limited (Appellant) v North	[2010] UKSC 47

	Lanarkshire Council (Respondent) (Scotland)	
194.	R v Maxwell (Appellant)	[2010] UKSC 48
195.	MA (Somalia) (Respondent) v Secretary of State for the Home Department (Appellant)	[2010] UKSC 49
196.	RBS (Respondent) v John Patrick McCormack Wilson and John Wilson and another (Appellants) (Scotland)	[2010] UKSC 50
197.	Holland (Respondent) v The Commissioners for Her Majesty's Revenue and Customs (Appellant) and another	[2010] UKSC 51
198.	R v Chaytor and others (Appellants)	[2010] UKSC 52
199.	Spiller and another (Appellants) v Joseph and others (Respondents)	[2010] UKSC 53
200.	The Child Poverty Action Group (Respondent) v Secretary of State for Work and Pensions (Appellant)	[2010] UKSC 54
201.	Progress Property Company Limited (Appellant) v Moorgarth Group Limited (Respondent)	[2010] UKSC 55
202.	Principal Reporter (Respondent) v K (Appellant) and others (Scotland)	[2010] UKSC 56
203.	R (on the application of Edwards and another) (Appellant) v Environment Agency and others	[2010] UKSC 57
204.	Commissioners for Her Majesty's Revenue and Customs (Respondent) v DCC Holdings (UK) Limited (Appellant)	[2010] UKSC 58
205.	R (on the application of Coke-Wallis) (Appellant) v Institute of Charted Accountants in England and Wales (Respondent)	[2011] UKSC 1
206.	Morge (FC) (Appellant) v Hampshire County Council (Respondent)	[2011] UKSC 2
207.	Yemshaw (Appellant) v London Borough of Hounslow (Respondent)	[2011] UKSC 3
208.	ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)	[2011] UKSC 4
209.	Global Process Systems Inc and another (Respondents) v Syarikat Takaful Malaysia Berhad (Appellant)	[2011] UKSC 5
210.	Manchester City Council (Respondent) v Pinnock (Appellant) (No.2)	[2011] UKSC 6
211.	Brent London Borough Council and others (Harrow London Borough Council) (Appellant) v Risk Management Partners Limited (Respondent)	[2011] UKSC 7
212.	Major and Burgesses of the London Borough of Hounslow (Respondents) v Powell (Appellant)	[2011] UKSC 8

213.	R v Forsyth (Appellant) R v Mabey (Appellant)	[2011] UKSC 9
214.	Sienkiewicz (Administratrix of Enid Costello deceased) (Respondent) v Grief (UK) Limited (Appellant) Knowsley Metropolitan council (Appellant) v Willmore (Respondents)	[2011] UKSC 10
215.	Patmalniece (FC) (Appellant) v Secretary of State for Work and Pensions (Respondent)	[2011] UKSC 11
216.	Walumba Lumba 1 and 2 and Kadian Mighty (Appellants) v Secretary of the State for the Home Department (Respondents)	[2011] UKSC 12
217.	Jones (Appellant) v Kaney (Respondent)	[2011] UKSC 13
218.	Duncombe and others (Respondents) v Secretary of State for Children, Schools and Families (Appellants)	[2011] UKSC 14
219.	Secretary of State for Communities and Local Government and another (Respondents) v Welwyn Hatfield Borough Council (Appellant)	[2011] UKSC 15
220.	Farstad Supply A/S (Respondent) v Enviroco Limited (Appellant)	[2011] UKSC 16
221.	Baker (Respondent) v Quantum Clothing Group Limited (Appellants) and others	[2011] UKSC 17
222.	R (on the app of Adams)(FC)(Appellant) v S of S for Justice; App by Eamonn MacDermott for Judicial Review (NI); App by Raymond Pius McCartney for Judicial Review (NI)	[2011] UKSC 18
223.	Commissioners for Her Majesty's Revenue and Customs (Appellant) v Tower MCashback LLP 1 and another (Respondents)	[2011] UKSC 19
224.	In the matter of an application by Brigid McCaughney and another for Judicial Review (Northern Ireland)	[2011] UKSC 20
225.	R (on the application of GC) (FC) (Appellant) and R (on the application of C)(FC) (Appellant) v Commissioner of the Police of the Metropolis (Respondent)	[2011] UKSC 21
226.	FA (Iraq) (FC) (Respondent) v Secretary of State for the Home Department (Appellant)	[2011] UKSC 22
227.	Shepherd Masimba Kambadzi (previously referred to as SK (Zimbabwe)(FC) (Appellant) v Secretary of State for the Home Department (Respondent)	[2011] UKSC 23
228.	Fraser (Appellant) v Her Majesty's Advocate (Respondent)	[2011] UKSC 24
229.	Bloomsbury International Limited and others (Respondent) v Sea Fish	[2011] UKSC 25

	Industry Authority and Department for Environment, Food and Rural Affairs (Appellants)	
230.	Parkwood Leisure Limited (Respondent) v Alemo-Herron and others (Appellants)	[2011] UKSC 26
231.	E (Children) (FC)	[2011] UKSC 27
232.	R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent); R (on the application of MR (Pakistan) (FC) (Appellant) v The Upper Tribunal and Secretary of State for the Home Department	[2011] UKSC 28
233.	Eba (Respondent) v Advocate General for Scotland (Appellant) (Scotland)	[2011] UKSC 29
234.	R (on the application of G) (Respondent) v The Governors of X School (Appellant)	[2011] UKSC 30
235.	NML Capital Limited (Appellant) v Republic of Argentina (Respondent)	[2011] UKSC 31
236.	Scottish Widows plc (Appellant) v Commissioners for Her Majesty's Revenue and Customs (Respondent) (Scotland)	[2011] UKSC 32
237.	R (on the application of McDonald) (Appellant) v Royal Borough of Kensington and Chelsea (Respondent)	[2011] UKSC 33
238.	Al-Rawi and others (Respondents) v The Security Services and others (Appellants)	[2011] UKSC 34
239.	Home Office (Appellant) v Tariq (Respondent); Home Office (Respondent) v Tariq (Appellant)	[2011] UKSC 35
240.	Duncombe and others (Respondents) v Secretary of State for Children, Schools and Families (Appellant) (No.2)	[2011] UKSC 36
241.	R v Smith (Appellant)	[2011] UKSC 37
242.	Belmont Park Investments PTY Limited (Respondent) v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc (Appellant)	[2011] UKSC 38
243.	Lucasfilm Limited and others (Appellants) v Ainsworth and another (Respondents)	[2011] UKSC 39
244.	Jivraj (Respondent) v Hashwani (Appellant); Jivraj (Appellant) v Hashwani (Respondent)	[2011] UKSC 40
245.	Autoclenz Limited (Appellant) v Belcher and others (Respondents)	[2011] UKSC 41
246.	Houldsworth and another (Respondents) v Bridge Trustees Limited and another (Respondents) and Secretary of State for Work and	[2011] UKSC 42

	Pensions (Appellant)	

Annex 2: Coding

Functional Variables

Name of Case

(a) Name of case

House of Lords/ Supreme Court

(a) House of Lords (1)
(b) Supreme Court (2)

Year/Session of Decision

(a) HL; 2007-2008 (1)
(b) HL; 2008-2009 (2)
(c) SC; 2009-2010 (3)
(d) SC; 2010-2011 (4)

Case Category

Human Rights

(a) Article 1-Jurisdiction (78)
(b) Article 2 - Right to Life (1)
(c) Article 3- Prohibition of Torture (2)
(d) Article 4- Prohibition of Slavery and Forced Labour (3)
(e) Article 5- Right to Liberty and Security (4)
(f) Article 6- Right to a Fair Trial (5)
(g) Article 7- No Punishment without Law (6)
(h) Article 8- Right to Respect for Private and Family Life (7)
(i) Article 9- Freedom of Thought, Conscience and Religion (8)
(j) Article 10- Freedom of Expression (9)
(k) Article 11- Freedom of Assembly and Association (10)
(l) Article 12- Right to Marry (11)
(m) Article 13- Effective Remedy (12)
(n) Article 14- Prohibition of Discrimination (13)
(o) Article 15- Derogation from the Convention (14)
(p) Article 16- Restrictions on Political Activity of Aliens (15)
(q) Article 17- Prohibition of abuse of Rights (16)
(r) Article 18- Limitation of Restrictions on Rights (17)
(s) Article 1 Part II First Protocol- Protection of Property (18)
(t) Article 2 Part II First Protocol- Right to Education (19)
(u) Article 3 Part II First Protocol- Right to free elections (20)

(v) Part 3 Article 1 of The Thirteenth Protocol - Abolition of the death penalty (21)

Domestic Constitutional, Administrative or Public Law matters

(a) Immigration (22)
(b) Family Law (23)
(c) Racial Discrimination (75)
(d) Disability Discrimination (76)
(e) Data Protection (77)
(f) Local government (24)
(g) Administrative law (25)
(h) Social Security/ Welfare (26)
(i) Police (27)
(j) Tax (28)
(k) Sentencing (29)
(l) Administration of Justice (30)
(m) Housing (31)
(n) Constitutional Law (32)
(o) Planning (33)
(p) Civil Procedure/ Evidence (34)
(q) Armed Forces (35)
(r) Education (36)
(s) Media and Entertainment (public parties) (37)
(t) Health (public parties) (38)
(u) Terrorism (39)
(v) Devolution Issue raised in a Scottish decision (40)
(w) Criminal Procedure/ Evidence (41)
(x) Criminal Law (42)

Private Party/ Law of Obligations

(a) Landlord and Tenant (43)
(b) Real Property (44)
(c) Contracts (45)
(d) Tort (46)
(e) Media and Entertainment (private parties) (47)
(f) Personal injury (48)
(g) Health and safety (49)
(h) Intellectual Property (50)
(i) Employment (51)
(j) Construction (52)
(k) Consumer law (53)
(l) Damages (54)
(m) Mental Health (55)

(n) Equity (56)
(o) Health (private parties) (57)
(p) Insurance (58)
(q) Shipping (59)
(r) Succession (60)
(s) Accountancy (61)
(t) Animals (62)
(u) Commercial Law (63)
(v) Company Law (64)
(w) Energy (65)
(x) Environment (66)
(y) Insolvency (67)
(z) Rates (68)
(aa) Restitution (69)
(bb) Pensions (79)

International (other than Human Rights)

(a) Extradition (70)
(b) European Union (71)
(c) International Law (72)
(d) Competition Law (73)
(e) Conflict of Laws (74)

Administrative Efficiency Variables

Length of Case

(a) 1 day (1)
(b) 2 days (2)
(c) 3 days (3)
(d) 4 days (4)
(e) 5 days (5)
(f) Longer than 5 days (6)

Judgment Gap

(a) No of days between hearing case and handing down judgment.

Length of judgment

(a) No of pages of judgment

Panel Size

(a) 5 Justices (1)

(b) 7 Justices (2)
(c) 9 Justices (3)
(d) 3 Justices (4)

Single Judgment

(a) No (1)
(b) Yes-composite or collective judgment (2)
(c) Yes- single judgment with formal concurrences (3)

Decision Splits

Combinations on the way a judgment can be split

(a) Unanimous
(b) 4/1
(c) 3/2
(d) 6/1
(e) 5/2
(f) 4/3
(g) 8/1
(h) 7/2
(i) 6/3
(j) 5/4

For each Combination above, the coding below will indicate whether any of the issues in the case were decided in that combination;

(a) This combination was not present on any issue (0)
(b) 1 issue and unanimous (or any other of the above combinations) on that issue (1)
(c) 2 issues and unanimous (or any other the above combinations) in both issues (2)
(d) 2 issues and unanimous (or any other of the above combinations) in 1 issue(3)
(e) 3 issues and unanimous (or any other of the above combinations) in all 3 issues (4)
(f) 3 issues and unanimous (or any other of the above combinations) in 1 issue (5)
(g) 3 issues and unanimous (or any other of the above combinations) in 2 issues (6)
(h) 4 issues and unanimous (or any other of the above combinations) in 1 issue (7)
(i) 4 issues and unanimous (or any other of the above combinations)in 2 issues (8)
(j) 4 issues and unanimous (or any other of the above combinations) in 3 issues (9)
(k) 4 issues and unanimous (or any other of the above combinations) in all 4 issues (10)
(l) 5 issues and unanimous (or any other of the above combinations) in 1 issue (11)
(m) 5 issues and unanimous (or any other of the above combinations)on 2 issues (12)
(n) 5 issues and unanimous (or any other of the above combinations) on 3 issues (13)
(o) 5 issues and unanimous (or any other of the above combinations)on 4 issues (14)
(p) 5 issues and unanimous (or any other of the above combinations) on all 5 issues (15)

Concurring opinions

(a) None (0)
(b) One (1)
(c) Two (2)
(d) Three (3)
(e) Four (4)

Dissenting opinions

(a) None (0)
(b) One (1)
(c) Two (2)
(d) Three (3)
(e) Four (4)

Relations with other Branches of State Variables

Finding against the Executive?

(a) Not applicable (0)
(b) Yes (1)
(c) No (2)

Relations with Lower Courts variables

Originating Court

(a) Court of Appeal Civil Division (1)
(b) Court of Appeal Criminal Division (2)
(c) High Court (3)
(d) High Court of Justiciary (4)
(e) Court of Session (5)
(f) Northern Ireland Court of Appeal (6)
(g) Northern Ireland High Court (7)

Result of Lower Court

(a) Unanimous (1)
(b) Divided (2)

Over-rule Lower Court

(a) Yes (1)
(b) No (2)
(c) Reversed in part (3)

Does the lower court follow established precedent?

(a) No precedent followed (1)
(b) Yes- precedent set by House of Lords/Supreme Court? (2)
(c) Yes- precedent set by lower court? (3)

Domestic Citations

(a) No of different Domestic Courts cited from a separate legal jurisdiction (2 different cases from one court will be counted as 2).

Relations with overseas courts variables

Relationship with Strasbourg

Strasbourg citations

(a) The number of Strasbourg authorities cited in any case.

Is the decision in line with Strasbourg?

(a) Not applicable (0)
(b) Yes(1)
(c) No (2)
(d) Justices unsure of what Strasbourg line of authority is (3)

Relationship with CJEU

CJEU Reference

(a) Not applicable (0)
(b) Yes (1)
(c) No (2)

CJEU citations

(a) the number of ECJ cases mentioned in each case.

Variables Measured for Post Thesis Study

Voting Pattern Variables

For each of the following Justices;

UK Supreme Court

(a) Lord Phillips
(b) Lord Hope
(c) Lord Walker
(d) Lady Hale

(e) Lord Brown
(f) Lord Mance
(g) Lord Kerr
(h) Lord Clarke
(i) Lord Dyson
(j) Lord Wilson
(k) Lord Rodger
(l) Lord Collins
(m) Lord Saville

Appellate Committee of the House of Lords (Law Lords who did not also sit in the Supreme Court)

(a) Lord Scott
(b) Lord Neuberger
(c) Lord Bingham
(d) Lord Hoffmann
(e) Lord Carswell
(f) Lord Mance
(g) Lord Cullen

Extra Judges who can be called upon to sit

(a) Lord Judge

Decision making patterns as follows;

(a) Not present (0)
(b) 1 issue present in the majority (1)
(c) 1 issue present in the dissent (2)
(d) 2 issues- present in majority on both (3)
(e) 2 issues- dissent in both (4)
(f) 2 issues-majority in 1; dissent in 1 (5)
(g) 3 issues present in majority in all 3 (6)
(h) 3 issues-dissent in all 3 (7)
(i) 3 issues-majority in 2; dissent in 1 (8)
(j) 3 issues-majority in 1; dissent in 2 (9)
(k) 4 issues-dissent in all 4 (10)
(l) 4 issues-majority in 3; dissent in 1 (11)
(m) 4 issues-majority in 2; dissent in 2 (12)
(n) 4 issues-majority in 1; dissent in 3 (13)
(o) 4 issues-present in majority in all 4 (14)
(p) 5 issues- dissent in all 5 (15)
(q) 5 issues-majority in 4; dissent in 1 (16)
(r) 5 issues-majority in 3; dissent in 2 (17)
(s) 5 issues majority in 2; dissent in 3 (18)
(t) 5 issues-majority in 1; dissent in 4 (19)
(u) 5 issues-majority in all 5 (20)

Academic citations

(a) No of different academic resources cited.

The break-out table is designed to find out more about the scholarly resources that the judges most often refer to in their judgments. The above numbers were coded into SPSS, with further detail as to the specific journal or book provided in a break out table;

- Academic Journal
- Book (including textbooks and monograph)
- Extra judicial authority (Government Report, Law Commission Report, Lecture, Contribution to Government Report, Hansard etc)

International Citations

(a) No of different International Courts cited (2 different cases from one court will be counted as 2)

European Citations

(a) No of different European Courts cited (2 different cases from one court will be counted as 2).

Intervener present?

(a) Yes (1)
(b) No (0)

Plus a break out table to establish which organisation intervenes the most often.

Intervention Citations

(a) Not applicable (0)
(b) One (1)
(c) Two (2)
(d) Three (3)
(e) Four (4)
(f) Five (5)
(g) Greater than five (6)
(h) Not mentioned (7)

Annex 3: Data Analysis Questions by Variable

(1) **Length of case** Average no of days to hear the case for each session and for each court, including mean, range etc. Any significant difference? Any outliers and why?

(i) Lower Court factors

- Does the length of the hearing increase if the CA is overturned and does it make a difference to length if the CA is overturned and the CA believed that they were following precedent?
- Does the length of hearing increase if the CA is divided?
- Does the length of the hearing increase depending on which court the appeal originated from?
- Does the length of the hearing increase depending on whether the CA were or were not following any precedent?

(ii) External Court Factors

- Does the length of the hearing increase if there are a larger number of Strasbourg or International or European or Domestic citations included in the judgment (suggesting that these cases were cited to and considered by the court in the actual hearing)?
- Does the no of days taken to hear the case increase or decrease if a reference is made to the ECJ?
- Does the no of days taken to hear a case increase if Strasbourg guidance is not being followed?

(iii) Volume of academic commentary included in case

- Does the length of the hearing increase if there is a larger amount of academic commentary included in the judgment which is finally handed down?

(iv) Whether or not there is an intervention

- Does the length of the hearing increase if an intervener intervenes on the case?

(v) Judge related factors

- Does the average length of hearing increase when the number of judges on the panel increases?
- Is there a correlation between a particular judge sitting on a case and the average length of case increasing/ decreasing?
- Is the length of the hearing less where only a single judgment is delivered?
- Does the length of the hearing increase the more concurring judgments and/or dissenting judgments that are provided in the judgment?
- Does the length of the hearing increase if the judges are not unanimous on all issues?

(vi) Type of case/ Issues to be heard

- Is there a correlation between the length of the hearing and any particular subject matter?

(vii) Executive related matters

- Does the length of hearing increase if the case involves the Executive and/ or overturns the Executive?

(2) **Judgment Gap** The average no of days for each session and for each court, including mean, range etc. Any significant difference? Any outliers and why?

(i) Size of case factors (Volume of material/ Difficulty of Case/ Importance of case)

- Is there a correlation between length of case and judgment gap i.e. do the shorter cases to hear take a shorter time period to produce a judgment?
- Is there a correlation between the length of the judgment in pages and the time taken to hand down the judgment?

(ii) Lower Court Factors

- Does the Judgment Gap increase if the CA is overturned?
- Does the Judgment Gap increase if the CA is divided?
- Does the Judgment Gap appear to increase depending on whether the CA was or was not following any precedent?
- Does the Judgment Gap increase depending on which court the appeal originated from?

(iii) External Court Factors

- Is the Judgment Gap affected by a reference to the ECJ?
- Does the Judgment Gap increase if there are more Strasbourg/European/ International/ Domestic citations?
- Does the Judgment Gap increase if the Strasbourg guidance is not being followed?

(iv) Volume of academic commentary included in case

- Does the Judgment Gap increase the more academic citations are included in the case?

(v) Whether or not there is an intervention?

- Does the Judgment Gap increase if an intervener intervenes on the case?

(vi) Judge Related factors

- Is there a correlation between a particular judge sitting on a case and the judgment gap increasing/ decreasing?
- Is the Judgment Gap affected if the size of panel of judges increases?
- Does the judgment gap increase or decrease where only a single judgment is produced in the case?
- Does the judgment gap increase the more concurring judgments and/or dissenting judgments that are provided?
- Does the Judgment gap increase if the judges are not unanimous on all issues?

(vii) Type of Case/ Issues to be heard

- Is the Judgment Gap greater for any particular subject matter?

(viii) Executive related matters

- Does the judgment gap increase if the case involves the Executive and/ or overturns the Executive?

(3) **No of pages** for each session and for each court, including mean, range etc. Any significant difference? Any outliers and why?

In determining 'why' the no of pages in the judgment may be increasing/ decreasing the following answers would be useful:

(i) Lower Court factors

- Do the no of pages increase if the CA is overturned?
- Do the no of pages increase if the CA is divided?
- Do the no of pages appear to increase depending on whether the CA was or was not following any precedent?
- Does the length of case increase or decrease depending on which court the appeal originated from?

(ii) External Court factors

- Do the no of pages increase if there are more Strasbourg/European/ International/ Domestic citations?
- Do the number of pages in the judgment decrease where there is a reference to the ECJ?

(iii) Volume of academic commentary included in case

- Do the no of pages increase the more academic citations are included in the case?

(iv) Whether or not there is an intervention

- Do the no of pages increase if an intervener intervenes on the case?

(v) Judge Related factors

- Is the no of pages less where a single judgment is delivered?
- Is there a correlation between a particular judge sitting on a case and the average no of pages increasing/ decreasing?
- Do the no of pages increase when the number of judges on the panel increases?
- Do the no of pages increase the more concurring judgments and/or dissenting judgments that are provided?
- Do the no of pages increase if the judges are not unanimous on all issues?

(vi) Subject matter/ Issues under Appeal related matters

- Is there a correlation between the no of pages and any particular subject matter?

(vii) Executive related matters

- Do the number of pages increase if the case involves the Executive and/ or overturns the Executive?

(4) **Originating Court** for each session and for each court, the differences in where the appeal originates from **This feeds into research questions for the other variables.**

(5) **Result of lower court-** Is the rate of overturn of the lower court affected by whether the lower court was unanimous or divided? Is there a difference between the various originating courts in terms of how often they are unanimous and how often they are divided? **This feeds into research questions for the other variables.**

(6) **Overrule lower court-** for each session and for each court what is the rate of over-rule? Has this changed in any significant way?

Factors which could be relevant to the CA being over-ruled;

(i) Judge related factors

- Is any particular judge present on the panel more often when the CA is over-ruled?
- Does the SC/HL tend to be unanimous when it over-rules the CA?
- Are there more instances of single opinions when the CA is being over-ruled?
- Do the Judges sit in larger panels when the CA is being over-ruled?
- Are there more dissenting/ concurring opinions when the CA is overruled?

(ii) CA related factors

- Is there one particular lower court that gets over-ruled more often than others and is this the same throughout all sessions?
- Is the CA more likely to be over-ruled where they are or are not following either HL or CA precedent.
- Is the CA more likely to be over-ruled where it is divided?

(iii) Subject matter/ Issues under appeal related factors

- Is there any particular subject matter of case that causes the CA to be over-ruled?

(iv) Academic citations

- Do the SC/ HL cite more academics when the CA is being over-ruled?

(v) External Court related factors

- When the CA is overturned is there more Strasbourg, International, European or domestic citations made.

(vi) Executive related factors

- Is the CA more likely to be overturned in cases that involve the Executive?

- In cases where the CA are overturned, are there any instances of a finding against the Executive by the SC/HL in that case?

(7) **Following established precedent-** for each session and each court have the rates at which the lower court is following precedent changed? Is this change significant?
- Does any particular lower court follow established precedent more than others?
- Is it more common to follow HL precedent or CA precedent and does this vary between the various lower courts?
- How does following precedent affect the rate of overturn?
- Is there any particular subject matter of case in which the CA are more likely to follow precedent?
- Are they more likely to follow precedent in cases which involve the Executive?
- Are they more likely to follow precedent in cases that involve a Strasbourg related matter?

(8) **No of academic citations-** average nos for each session and for each court, including mean, range etc. Any significant change?

Factors which could explain an increase/decrease in academic citations;

(i) The particular subject matter/ issues in the case
- Do the no of academic citations increase with any particular subject matter?

(ii) Judge related factors
- Does the no of academic citations increase when any particular judge is on the panel?
- Do the number of academic citations increase when the judges are divided?
- Do the number of academic citations increase when the panel of Justices increases?
- Are there more Academic citations in single opinion cases?
- Are there more Academic citations in cases where more concurring or more dissenting opinions are given?

(iii) Executive related factors
- Do the number of academic citations increase when it is a case involving the Executive and especially in cases where the Executive is overturned?

(iv) Lower court related factors
- Do the number of academic citations increase when the CA is overturned (and is this true for each of the different lower courts) and if so did the CA believe that they were following precedent?
- Are there more academic citations in cases where the CA is overturned and they were unanimous?

(v) Intervener present

- Do the number of academic citations increase when there is an intervener present?

(vi) Efficiency of the Court matters

- The volume of academic citations also feeds into judgment length, judgment gap and length of case- see above.

(vii) External Courts

- Any link between the no of International, European, Domestic and Strasbourg citations and the no of academic citations that are made in the case?

(9) No of International citations- average nos of citations for each session and for each court, including mean, range etc. Any significant change?

Factors which could be relevant in an increase in International citations;

(i) The particular subject matter/ issues in the case

- Does the no of International citations increase with any particular subject matter?

(ii) Judge related factors

- Does the no of International citations increase when any particular judge is on the panel?
- Does the no of International citations increase when the judges are divided?
- Do the number of International citations increase when the panel of Justices increases?
- Are there more International citations in single opinion cases?
- Are there more International citations in cases where more concurring or more dissenting opinions are given?

(iii) Executive related factors

- Do the number of International citations increase when it is a case involving the Executive and especially in cases where the Executive is overturned?

(iv) Lower court related factors

- Do the number of International citations increase when the CA is overturned (and is this true for each of the different lower courts) and if so did the CA believe that they were following precedent?
- Are there more International citations in cases where the CA is overturned and they were unanimous?

(v) Intervener present

- Do the number of International citations increase when there is an intervener present?

(vi) Efficiency of the Court matters

- This also feeds into **judgment length**, **judgment gap** and **length of case**- see above.

(vii) External Courts

- Any link between the no of International, European, Domestic and Strasbourg citations and the no of academic citations that are made in the case?

(10) No of European citations-average nos for each session and for each court, including mean, range etc. Any significant change?

(i) The particular subject matter/ issues in the case

- Does the no of European citations increase with any particular subject matter?

(ii) Judge related factors

- Do the no of European Citations increase when any particular judge is on the panel?
- Do the no of European Citations increase when the judges are divided?
- Do the no of European Citations increase when the panel of Justices increases?
- Are there more or less European citations in single opinion cases?
- Are there more European citations in cases where more concurring or more dissenting opinions are given?

(iii) Executive related factors

- Do the number of European Citations increase when it is a case involving the Executive and especially in cases where the Executive is overturned?

(iv) Lower court related factors

- Do the number of European citations increase when the CA is overturned (and is this true for each of the different lower courts) and if so did the CA believe that they were following precedent?
- Are there more European citations in cases where the CA is overturned and they were unanimous?

(v) Intervener present

- Do the number of European citations increase when there is an intervener present?

(vi) Efficiency of the Court matters

- This variable also feeds into **judgment length, judgment gap** and **length of case**- see above.

(vii) External Courts

- Any link between the no of International, European, Domestic and Strasbourg citations and the no of academic citations that are made in the case?

(11) **No of domestic citations-** average nos for each session and for each court, including mean, range etc. Any significant change?

(i) <u>The particular subject matter/ issues in the case</u>

- Does the no of Domestic citations increase with any particular subject matter?

(ii) <u>Judge related factors</u>

- Do the no of Domestic Citations increase when any particular judge is on the panel?
- Do the no of Domestic Citations increase when the judges are divided?
- Do the no of Domestic Citations increase when the panel of Justices increases?
- Are there more Domestic citations in single opinion cases?
- Are there more Domestic citations in cases where more concurring or more dissenting opinions are given?

(iii) <u>Executive related factors</u>

- Do the number of Domestic Citations increase when it is a case involving the Executive and especially in cases where the Executive is overturned?

(iv) <u>Lower court related factors</u>

- Do the number of Domestic citations increase when the CA is overturned (and is this true for each of the different lower courts) and if so did the CA believe that they were following precedent?
- Do the number of Domestic citations increase when the appeal originates from any particular lower court?
- Are there more domestic citations in cases where the CA is overturned and they were unanimous?

(v) <u>Intervener present</u>

- Do the number of Domestic citations increase when there is an intervener present?

(vi) <u>Efficiency of the Court matters</u>

- This also feeds into **judgment length**, **judgment gap** and **length of case**- see above.

(viii) <u>External Courts</u>

- Any link between the no of International, European, Domestic and Strasbourg citations and the no of academic citations that are made in the case?

(12) **Case categories-** As well as feeding into the analysis on the other variables, it would be useful to see whether any case categories have reduced or increased significantly between the years and the courts.

(13)**Finding against the Executive-** Has there been any significant change in the no of cases that involve the executive and also the rate of finding against the Executive between the sessions and between the courts?

(i) Lower Court related matters

- Do the cases involving the Executive tend to originate from one particular lower court?
- Does the lower court tend to be unanimous on these Executive related decisions?
- What is the rate of overturn of the lower court in cases that involve the Executive and in which of those overturned cases does the CA feel that it was following precedent?

(ii) The particular subject matter/ issues on the case

- Do the cases involving the Executive correlate to any particular subject matter?

(iii) Judge related matters

- Do the cases involving the Executive tend to have a higher than average instance of larger panels of judges sitting on the case?
- Does one particular judge have a higher than average presence on cases involving the Executive?
- Do cases involving the Executive tend to be unanimous decisions or is there division?
- Do cases involving the Executive tend to have a higher occurrence of single judgments?
- Do cases involving the Executive have a higher number of concurring or dissenting opinions?

(iv) Intervener presence

- Do interveners intervene more frequently on cases that involve the Executive?

(v) External Courts

- Is there a higher instance of Strasbourg citations, EC citations, International or European citations in cases that involve the Executive?

(vi) Academic citations

- Is there a higher instance of academic citations in cases that involve the Executive?

(vii) Efficiency of the Courts matters

- Does the involvement of the Executive on the case increase the **judgment gap judgment length** or **no of days taken to hear the case.**

(14) **Concurring judgments-** how many concurring judgments are there on average and has this increased or decreased for each session and for each court in any significant way?

Factors which may affect this

(i) Judge related matters

- Do the number of concurring opinions given increase when the no of judges sitting on the case increases?
- Do the number of concurring opinions decrease when the SC/HL is unanimous on all issues?
- Do the number of concurring opinions increase when the SC/HL is divided on at least one issue?
- Does the number of concurring opinions increase when there is also dissenting opinions on the case?

(ii) Lower court matters

- Does the number of concurring opinions increase when the CA is being overturned and does it make a difference whether the SC/HL is overturning a unanimous or a divided CA?
- Are there more instances of concurring opinions when the case originates from a particular lower court?
- Do the no of concurring opinions increase where the SC/HL is overturning a CA that believes it is following precedent and does it make a difference whether it is HL or CA precedent?

(iii) Executive related matters

- Does the number of concurring opinions increase when the case involves the Executive and in particular when the Executive is being overturned?

(iv) Administrative matters

- Does the number of concurring opinions provided increase the length of the judgment and the length of the judgment gap?

(v) Subject matter/ issues in case

- Does the number of concurring opinions increase when a particular subject matter is involved?

(vi) External Court related matters

- Do the number of concurring opinions increase where the Strasbourg line of authority is rejected?
- Do the number of concurring opinions increase where a reference is or is not being made to the ECJ?
- As the no of concurring opinions increases does this result in an increase in Domestic/ European/ International/ Strasbourg or EC citations?

(vii) Academic related matters

- As the no of concurring opinions increases does this result in an increase in academic citations?

(15) **Dissenting opinions-** how many dissenting judgments are there on average and has this increased or decreased for each session and for each court in any significant way?

(i) Judge related matters

- Does the number of dissenting opinions given increase when the no of judges sitting on the case increases?

(ii) Lower Court matters

- Do the number of dissenting opinions increase when the CA is being overturned and is this still true where the CA is being overturned and is unanimous or being overturned believes it is following firstly HL and secondly CA precedent?
- Is there more instances of dissenting opinions when the case originates from a particular lower court?

(iii) Executive related matters

- Does the number of dissenting opinions increase when the case involves the Executive and/or where the Executive is being overturned?

(iv) Administrative matters

- Does the number of dissenting opinions provided increase the length of the judgment and the length of the judgment gap?

(v) Subject matter/ Issues in case

- Does the number of dissenting opinions increase when a particular subject matter is involved?

(vi) External Court related matters

- Do the number of dissenting opinions increase where the Strasbourg line of authority is rejected?

- Do the number of dissenting opinions increase where a reference is or is not being made to the ECJ?

- Does a higher no of dissents result in a corresponding increase in International/ Domestic/ European, Strasbourg or EC Citations?

(viii) Academic matters

- Does a higher no of dissents result in a corresponding increase in Academic Citations?

(16) **Single Judgment-** how many single judgments are there on average and has this increased or decreased for each session and for each court in any significant manner?

(i) Efficiency

- Has the most common type of single judgment given changed between sessions and years?
- Does the single judgment reduce average judgment length, judgment gap and length of hearing?

(ii) Subject matter/ Issues in case

- Do single judgments occur more often for any particular subject matter of case?

(iii) Lower Court related matters

- Do single judgments occur more often when the case originates from any particular court?
- Do single judgments occur more often when the CA is being overturned and does it matter if the CA is being overturned and unanimous or overturned and believes that it is following firstly HL or secondly CA precedent?

(iv) Judge related matters

- Do single judgments only occur where there are 5 Justices on the panel?
- Is there one particular judge who is present most often when single judgments are handed down?

(v) Executive related matters

- Do single judgments ever occur where the case involves the Executive and do they ever occur where the Executive is being overturned?

(vi) External Court related matters

- Does the average no of Strasbourg, EC, European, International and Domestic comparative citations decrease in cases where a single judgment is delivered?

(vii) Academic related matters

- Does the average no of academic citations decrease in cases where a single judgment is delivered?

(17) **No of Strasbourg authorities-** how many Strasbourg authorities are cited on average and has this increased or decreased for each session and for each court? [**Adam- The stats will need to be worked out on the basis of all the cases in the sample and then again just including the cases that involved consideration of Strasbourg jurisprudence i.e. those that either followed or rejected the Strasbourg line of authority and did not have a 'not applicable' marked in that column.**)

(i) The particular subject matter/ issues in the case

- Does the no of Strasbourg citations increase with any particular subject matter?

(ii) Judge related factors

- Do the no of Strasbourg Citations increase when any particular judge is on the panel?
- Do the no of Strasbourg Citations increase when the judges are divided?
- Do the no of Strasbourg Citations increase when the panel of Justices increases?
- Are there more or less Strasbourg citations in single opinion cases?
- Are there more Strasbourg citations in cases where more concurring or more dissenting opinions are given?

(iii) Executive related factors

- Do the number of Strasbourg Citations increase when it is a case involving the Executive and especially in cases where the Executive is overturned.

(iv) Lower court related factors

- Do the number of Strasbourg citations increase when the CA is overturned (and is this true for each of the different lower courts) and if so did the CA believe that they were following either HL or CA precedent?

- Do the number of Strasbourg citations increase when the appeal originates from any particular lower court?

- Do the number of Strasbourg citations increase where the CA is overturning a unanimous CA

(v) Intervener present

- Do the number of Strasbourg citations increase when there is an intervener present?

(vi) Efficiency of the Court matters

- This also feeds into **judgment length**, **judgment gap** and **length of case**- see above.

(vii) External Courts

- Any link between the no of International, European, Domestic and Strasbourg citations and the no of academic citations that are made in the case?

(18) **Case in line with Strasbourg-** how many instances has there been for each session which involves a Strasbourg line of authority and has this increased or decreased for each session and for each court? How many instances are there of the judges rejecting the Strasbourg line of authority and has this increased or decreased for each session and for each court in any significant way?

(i) Subject matter/ Issue related matters

- Does any particular subject matter result in a greater instance of rejecting the Strasbourg line?

(ii) Judge related matters

- Does any particular judge sit most often on Strasbourg cases?
- Is any particular judge present most often when the Strasbourg line of authority is rejected or where it is unclear what the Strasbourg line of authority is?
- When the Strasbourg line is rejected or unclear does that result in an increase in Justices sitting on the panel?
- When Strasbourg jurisprudence is under consideration does this result in a greater or lesser no of concurring and dissenting judgments and does it make a difference whether the Strasbourg line of authority is being accepted or rejected.

(iii) Efficiency of Court matters

- When the Strasbourg line is rejected or unclear does that result in a longer judgment or a wider judgment gap or a longer hearing?
- When the case involves consideration of Strasbourg jurisprudence does that result in a longer judgment or a wider judgment gap or a longer hearing?

(iv) Executive related matters

- When the Strasbourg line is rejected or unclear, how often is that also a case which involves the Executive and where it is rejected, is that a finding for or against the Executive?

(v) External Court related matters

- When a case involves Strasbourg jurisprudence is there a greater or lesser than average no of International Citations, European Citations or Domestic citations? Does this change if the Strasbourg line of authority is rejected?

(vi) Academic related matters

- When a case involves Strasbourg jurisprudence is there a greater or lesser than average no of Academic citations? Does this change if the Strasbourg line of authority is rejected?

(19) **Was reference made to the ECJ-** How many times for each court and also for each session has the case involved a reference to the ECJ and as a proportion of those cases how many times has the court made a reference and declined to make a reference? Is there any significant difference?

(i) External Court related matters

- Are there more EC authorities cited in cases that involve a reference either being made or not being made to the ECJ than where a reference is not considered?
- Are there instances of cases where Strasbourg citations are made in cases that involve a reference being considered?
- Are European Comparative Citations cited in cases where a reference to the ECJ is being considered?

(ii) Efficiency of the Court

- Does the decision to make a ECJ reference increase the judgment gap?
- Does the decision to make a ECJ reference increase the judgment length?

(iii) Judge related matters

- Does a decision to make an ECJ reference tend to involve single judgments of the court?
- Are the judges ever divided on a case where a ECJ reference is being considered?
- Is there any one particular judge who sits on a case more often where a ECJ reference is being considered?

(iv) Academic related matters

- Does the average no of academic citations increase or decrease where a reference is made to the ECJ?

(20) **No of EC Authorities-** Has the average no of EC citations as between sessions and courts increased or decreased? What is the range? Are there any significant difference between the years?

(i) The particular subject matter/ issues in the case

- Do the no of EC citations increase with any particular subject matter?

(ii) Judge related factors

- Do the no of EC Citations increase when any particular judge is on the panel?
- Do the no of EC Citations increase when the judges are divided?
- Do the no of EC Citations increase when the panel of Justices increases?
- Are there more or less EC citations in single opinion cases?
- Are there more EC citations in cases where more concurring opinions are given?
- Are there more EC citations in cases where more dissenting opinions are given?

(iii) Executive related factors

- Do the number of EC Citations increase when it is a case involving the Executive and especially in cases where the Executive is overturned?

(iv) Lower court related factors

- Do the number of EC citations increase when the CA is overturned (and is this true for each of the different lower courts) and if so did the CA believe that they were following precedent?
- Do the number of EC citations increase when the appeal originates from any particular lower court?
- Do the number of EC Citations increase where the CA is being overturned and is unanimous?

(v) Intervener present

- Do the number of EC citations increase when there is an intervener present?

(vi) Efficiency of the Court matters

- This also feeds into judgment length, judgment gap and length of case- see above.

(vii) External Courts

- Any link between the no of International, European, Domestic and Strasbourg citations and the no of academic citations that are made in the case?

(21) **Judges' voting patterns-** As discussed, if there is any way that you can work out which combination of judges sits the most often and how they vote. Cross-tabs displaying each of the stats for each judge for each session though would also be useful, to see the biggest dissenter. **This feeds into other variables in terms of levels of unanimity and how that has a bearing on other matters.**

(22) **Panel Size-** Pie charts would be useful in order to demonstrate any change between the sessions and also between the two courts in terms of the proportion of cases heard by a particular size of panel. **Panel Size has fed into the other variables above**.

(23) **Decision Splits-** What is the frequency of each combination of decision split as between each of the sessions and each of the courts and is there any significant difference?

(i) Judge related matters

- Is there less unanimity when there is a larger panel size i.e. what is the relationship between panel size and decision splits?
- Is there less unanimity when any particular judge sits on the case?

(ii) Executive related matters

- Is there less unanimity where the Executive is involved in the case and indeed when the Executive is overturned?

(iii) Lower Court related matters

- Is there less unanimity where the CA is being overturned? Does it make a difference whether the overturned CA were unanimous or divided or felt that they were following precedent?
- Is there less unanimity on cases from any particular lower court?

(iv) External Court related matters

- Is there less unanimity in cases which involve Strasbourg and indeed where the Strasbourg line is not being followed?
- Is there less unanimity where an EC reference is made?
- Is there a correlation between, no of International Court citations, No of European Citations, No of Strasbourg citations and No of EC citations and the level of unanimity in the case i.e.

the less unanimity that there is in the court, the more the judges feel the need to cite from these other resources.

(v) Efficiency of Court matters

- Is it true that as unanimity levels are lower, there is an increase in hearing length, judgment length and judgment gap?

(vi) Intervener present

- Are levels of unanimity affected by the presence of an intervener?

(vii) Academic matters

- Do the numbers of academic citations increase as the level of unanimity in the court decreases?

(viii) **Intervener Present-** Has the number of interventions increased or decreased as between the different sessions and the different courts and is this significant?

(ix) **No of references to Intervener-** Have the no of references to the intervention increased or decreased on average as between the different sessions and also between the different courts?

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